THE CENTRAL LAW JOURNAL.

SEYMOUR D. THOMPSON, Editor. | ST. LOUIS, FRIDAY, SEPTEMBER 15, 1876. | Hon. JOHN F. DILLON, Contributing Editor.

Current Topics.

THE IOWA LAW SCHOOL.—The twelfth annual course of the Law School of the Iowa State University commenced on Wednesday last, and will close June 19, 1877. By section 209 of the Iowa code, students completing a course at this institution, and receiving the degree of LL. B., are admitted to the bar of that state without further examination. In response to the request of a number of the recent graduates, the Regents of the university have organized an advanced class, composed of students who have completed the regular course, with such others as are sufficiently qualified to take the senior course. We are glad to see this endeavor on the part of the authorities of this institution to extend the term of probation and study required of a student of the laws. We have, on more than one occasion, called attention to the ease with which lawyers are ground out from the legal mills of the country. We have urged that the time should be extended and the *curriculum* enlarged, and we have strong hopes that we shall yet see these things accomplished.

The advanced course in the Iowa law school is to be optional until the legislature shall by law require more thorough preparation from all candidates for admission to the bar. In the circular which we have received from the faculty, the hope is expressed that this will be accomplished at the next session of the legislature. We can not help thinking that the new course proposed by the Regents had better have been obligatory, instead of optional. The young men of the present day unquestionably prefer rapidity to thoroughness, and we shall be very much mistaken if a large majority of the students of this year do not reach the bar by the easier road. There is however some consolation in knowing, that brief as the course has been made through short-sighted legislation, the time will be well spent. The lecturers and instructors include many names known throughout the country, and the fame of the chancellor, Dr. Hammond, is not confined to the United States.

PHOTOGRAPHIC COPIES OF DOCUMENTS.—The Supreme Court of Michigan in *In re* Foster, 3 Am. Law Times Rep. 411, have recently held that photographic copies of manuscript are only secondary evidence, like any copies, and that it is not error to exclude them from the consideration of the jury, where the original is at hand. It would not, say the court, be true to say that every photographic copy would be safe on any enquiry requiring minute accuracy. Few copies can be so satisfactory as a good photograph. But all artists are not competent to make such pictures on a large scale, and all photographs are not absolutely faithful resemblances. It is quite possible to tamper with them, and an impression which is at all blurred would be very apt to mislead on questions of handwriting, where forgery is claimed. Whether it would or would not be permissible to allow such documents to be used, their use can never be compulsory. The original, and not the copy, is what the jury must act upon, and no device can properly be allowed to supersede it. Copies of any kind are merely secondary evidence. However fortunate it may be that copies can now be produced which will closely resemble originals, it would be an unauthorized assumption to hold that courts should be compelled to receive additional and supplementary proofs, which were neither necessary nor admissible before, and which are at best merely convenient aids to enable juries to dispense with the use of the primary evidence.

EVIDENCE IN JURY ROOM.—In the same case, which was a contract over a will, the court was called upon to consider the propriety of allowing documents to be taken to the jury-room by the jury. This they decide in the negative. The refusal, they say, to require the original will to be taken to the jury-room, when the jury had not desired it, was not contrary to law or practice. It has even been questioned whether it could properly be allowed at all; but this seems to be rather disfavored than absolutely erroneous. Much may be said on both sides of such a question. But the purpose avowed in this cause of having the jury use the document to look for resemblances between the body and the signature, for the purpose of inferring forgery, indicates some danger in permitting it. When a juror is to give testimony, he must do it in open court. Yet, practically, this jury-room inquest would involve the expressions of opinions belonging somewhat to the domain of expert evidence, and having the force of facts, when, if it were assumed the jury was competent to settle such matters by their own skill, it might not be competent to examine witnesses upon it at all. Nothing can be more dangerous than to allow the suspicions and surmises of men, whose opinions could not often be received as witnesses, to fix the rights of parties by their fanciful notions of resemblances or differences. In this country, most jurors are not illiterate, but it would be very strange if the average members of juries could be regarded as qualified to form safe opinions on an inspection of papers upon nice points of identity in handwriting, especially when the whole case may depend upon their correctness. Juries can, undoubtedly, and must use their judgment more or less concerning documents laid before them, and have it in their power to rely on their own views very much if they see fit. But the law presumes they will act on testimony chiefly, if not entirely, and it would not be proper to assume that they all have equal knowledge or skill in such enquiries, or that when they consult together, the opinions of one would not have more influence than those of another, when the opinions operate as facts in the cause. If a verdict were formed on statements of ordinary facts by one juror to his fellows, it would be a violation of their oaths. When opinions are such as to stand in the same light, the result can not be much less dangerous. No harm can usually result from the possession of documents in the jury-room, because they seldom call for examinations of their genuineness, and are usually only important for their contents. When their genuineness is in controversy, and that is to be judged by resemblances and peculiarities on which witnesses have been examined as experts, their inspection alone may become one of the means of evidence requiring skill to deduce its results. Every one knows how very unsafe it is to rely upon any one's opinions concerning the niceties of penmanship. The introduction of professional experts has only added to the mischief instead of palliating it, and the results of litigation have shown that these are often the merest pretenders to knowledge, whose notions are pure speculation. Opinions are necessarily received, and may be valuable, but, at best, this kind of testimony is a necessary evil. Those who have had personal acquaintance with the handwriting of a person are not always reliable in their views; and single signatures, apart from some known surroundings, are not always recognized by the one who made them. Every degree of removal beyond personal knowledge into the domain of what is sometimes called, with great liberality, scientific opinion is a step towards greater uncertainty, and the science

which is so generally diffused is of very moderate value. Subject to cross-examination, it may be reduced to the minimum of danger. In a jury-room, without any check or corrective, it would be very dangerous indeed.

Taxation of Railway Rolling Stock.

Below we publish a very important opinion of the attorney-general of Illinois, relating to the mode of assessment of rolling stock of railway companies for taxation. The rule is becoming generally adopted, that such property is taxable, not as other personal property, by the state, within which its owners reside, but as real property, by the state where it has its *situs*. The unreported decision of the Supreme Court of Illinois, quoted by the attorney-general, would seem more likely to lead to confusion in the assessment of such property than otherwise. No reason is perceived whereby the rolling stock of the Pullman Palace Car Company, which is known to belong to a corporation residing in the state of Illinois, may not be assessed for taxation, by every state within which such property is used, as the property of its real owners, instead of assessing it as the property of the railway companies upon whose roads it is used. We know, as a matter of fact, that the practice of the Missouri Board of Equalization is to assess this property, as the property of its real owners. The property itself, in the case of railway rolling stock, is tangible and may be easily subjected to the payment of the tax by the authorities of the state within which it is used, without the necessity of their resorting to the questionable device of assessing it as property of a corporation which is not its owners.

With regard to the immediate question under consideration by the attorney-general, there would not seem to be any more difficulty. Where rolling stock of a railway company has been sold under a mortgage, the person or corporation becoming the purchaser can generally be ascertained by reference to the public records, and, it is presumed, can always be ascertained, if the public records are silent, by the examination of the tenants of the property or of other persons acquainted with the facts. There would seem to be no insuperable difficulty in the way of ascertaining the real owners such as should compel the assessing officers to place upon the terms of the statute a meaning entirely different from the obvious and usual import of the words used,—a construction which would generally result in assessing the property as the property of persons or corporations not its real owners, a thing manifestly not intended by the statute.

The opinion referred to is as follows:

SPRINGFIELD, ILL., Sept. 7, 1876.

Hon. C. E. Lippincott, Chairman State Board of Equalization:

SIR—I have the honor to acknowledge the receipt of the following resolution adopted by the state board of equalization on the 25th ult:

Resolved, That the attorney-general be requested to give his opinion on the following point: In case the rolling stock of a railroad company has been closed out by chattel mortgage previous to May 1 in any year, and said rolling stock remains in possession of and is used by said railroad company, is such company liable to be assessed for taxation for such rolling stock for that year?

There are not sufficient facts stated in the above question to enable me to give a direct and unqualified affirmative or negative answer thereto.

A statement of the law bearing upon the question will enable your board to apply the same to the facts of each particular case, as the same shall arise. The statute contains this provision:

"Every person, company or corporation owning, constructing or operating a railroad in this state, shall, in the month of May, annually, return a list or schedule, which shall contain a correct detailed inventory of all the rolling stock *belonging to such company*, and which shall distinctly set forth the number of locomotives of all classes, passenger-cars of all classes, sleeping and dining-cars, express-cars, baggage-cars, house-cars, wrecking-cars, cattle-cars, coal-cars, platform-cars, hand-cars, and all other kinds of cars." Rev. Stat. 1874, p. 865, sec. 44.

The question arises as to the proper meaning of the words "belonging to such company."

This language, used on a similar occasion, had received a judicial construction prior to the enactment of the present revenue law in 1872.

In the case of Kennedy, assessor of Madison County v. The St. Louis, Vandalia and Terre Haute Railroad Company (unreported), the supreme court of the state held that sleeping-cars owned by the Pullman Palace Car Company, but which were habitually used by the railroad company upon its line of road, in pursuance of a contract between the two companies, were cars *belonging* to the railroad company within the meaning of the revenue law, and were properly assessed against it.

The supreme court say: "Although the general property in the cars is in the car company, the appellee has a community of interest in them for the time being. There are not unfrequently cases in the law where one having a less estate in property than that of absolute ownership fulfils the condition of being owner. The requirement, too, of the statute is to list, not the rolling stock which the company owns, but the rolling stock belonging to the company. We are of the opinion that the appellee has such a qualified property in these sleeping-cars that for taxable purposes they may be regarded within the fair meaning of the statute as 'belonging' to the rolling stock of the company, and that they are subject to be taxed as forming a part of the same." * * * We do not conceive, as is objected, that this would involve the result of double taxation of both the railroad company and the car company. The liability of the railroad company to pay taxes on the cars as a portion of its rolling stock would operate to exempt the car company from liability to pay the taxes as owners of the cars. The railroad company would be viewed as the owner *pro hac vice*. The revenue law now in force, like the statute before the court in the case cited, requires the assessed value of the rolling stock of railroad companies to be distributed to the several counties, towns and cities through which the same runs, for taxation therein, in the proportion that the number of miles of main track in each county, city or town bears to the entire length of the line, while the general rule in the assessment of other personal property is that it shall be assessed at the domicile of the owner.

In view of this feature of the law, the supreme court said:

"It will be seen that legislation for this subject has made the rolling stock of railroads an exception to the general rule of personal property, being taxable at the place of residence of the owner, and required the taxes on it to be paid *pro rata* in the several counties, towns and cities through which the road may run. The policy of the legislature would be contravened in holding the Pullman Palace Car Company alone liable for the payment of these taxes."

This reasoning is equally applicable to the law now in force.

My conclusion is, that if the railroad company was using the rolling stock upon its road by the consent of the owners, express or implied, it was rolling stock belonging to the railroad company within the meaning of the law, and may rightfully be assessed against it, although the same may in fact be owned by some other party. The fact that a railroad company is in the undisputed possession of rolling stock and using the same in the operation of its road, would of itself warrant the inference that the owner of such rolling stock, whoever it might be, assented to such use and possession thereof by the railroad company.

Very respectfully,

JAMES K. EDSALL, Attorney-General.

Construction of Contract between Railroad and Telegraph Company.

The case of the Western Union Telegraph Company v. The Western and Atlantic Railroad Company, decided at the last term of the United States Supreme Court, arose out of a contract concerning a line of telegraph along the road of the railroad company, and the question to be settled was the proper construction of the contract under which the defendant company claimed. The facts were as follows: The state of Georgia, which was the sole owner of the railroad called the Western and Atlantic Railroad, desiring the use of a telegraph for the purposes of the road along its line, an instrument of writing was signed by the president, on behalf of the Western Union Telegraph Company, and by the superintendent of the railroad, which was approved by the governer, countersigned and dated August 18, 1870. The substance of this agreement was that the telegraph company should put up and set apart on its line of poles already there, along the railroad, a telegraph line for the exclusive use of the railroad; equip it with as many instruments, batteries and other necessary fixtures as might be required for use in the railroad stations; run the wire into all the offices along the line of the road, and put the same in complete working order. Other provisions of the agreement related to the terms on which the officers of the road might transmit and receive messages through the connecting lines of the telegraph company; to the right of way of the telegraph company along the line of road, and other matters regulating the use of the wire and compensation for it. The sixth article of the agreement bound the

state to pay the cost of constructing the wire and of equipping the same at railroad stations not already supplied with instruments, batteries, and other necessary fixtures, as soon as this cost could be ascertained. Shortly after the wires were put up and the instrument in working order, the governor of the state leased the road for twenty years, under authority of an act of the legislature, to certain persons, who became a body corporate by the name of the Western and Atlantic Railroad Company. The instrument witnessing the contract professed to grant, convey and lease to the Western and Atlantic Railroad Company "the Western and Atlantic Railroad, which is the property of the state of Georgia, together with all its houses, work-shops, depots, rolling stock and appurtenances of every character, for the full term of twenty years." The railroad company took possession of the road and its appurtenances under the lease, including the wire and batteries and instruments put on the road and in its offices by the telegraph company, under the contract with the state. But having this possession, they refused to pay for the transmission of messages over connecting lines, according to the terms of the contract, and claimed that they were not bound by it, and that in fact the true construction of that agreement was that the state had bought and paid for the wire and instruments, and owned them, and as lessees of the state, the company had the right to control and use them without any liability to the telegraph company.

The telegraph company thereupon filed a bill in the Circuit Court of the United States for the Northern District of Georgia, which, after stating the refusal of the railroad company to recognize its rights in any respect, while they insisted on using the wires and apparatus, refusing also to allow the complainants any use of the wires and instruments in their offices and depots, alleged, that these considerations induced the complainants to treat as revoked and withdrawn all powers and privilege on the part of the defendants to use said wire and apparatus, or to receive compensation therefor, and that the complainants, seeking to recover possession of them, had been hindered and obstructed by the defendants in so doing. The bill prayed that defendants might be enjoined from using the wires, from hindering or obstructing plaintiffs in the use of them, or in severing them from all the offices of defendants. The defendants in their answer denied that the contract between the telegraph company and the state was valid, being without authority of law; denied that, if valid, they, as lessees of the railroad, were bound by its terms; and asserted that, by the true construction of the contract, the state became the purchaser and owner of the wire and instruments, and that the company succeeded to this ownership without being bound by the other terms of the agreement. The railroad company also filed a cross-bill, setting up this view of their rights, and praying an injunction against the telegraph company to restrain it from interfering with the use of the wire and apparatus so acquired from the state. The district court dismissed this cross-bill on demurrer, and on the hearing, the original bill of complainants on the answer and evidence, and decreed that the wire and instruments in question were the property of the state of Georgia and were included in the lease to the railroad company, and that this company was not bound by the terms of the contract in other respects, unless adopted by it, and, therefore, dismissed the bill.

The Supreme Court of the United States, Miller and Field, JJ., dissenting, have reversed the decision of the circuit court. The learned judge in delivering the opinion of the court said, "We do not think that the state simply bought a wire and batteries and other instruments and became absolute owners of them. On the contrary, we think that the contract was for the use of a wire and instruments of the telegraph company. The language of the first covenant of the telegraph company is that it agrees 'to set apart on its line of poles along said railroad a telegraph wire for the exclusive use of said party of the second part.' The further covenants are all consistent with this. The contract for the use of this wire in connection with the others, and for the use of one of the wires already there, when this shall be disabled, the fact that it is placed upon the poles of the company already in use for two other wires, the agreements regulating the officers, and, in short, the whole frame of the contract, show that the wire, the poles, the instruments were the property of the telegraph company, with exclusive use of *this* wire transferred to the railroad. This view is perfectly consistent with the idea that the state should pay the cost and expense of the additional wire and instruments rendered necessary by this agreement for its exclusive use, which does not prove that anything more than this right to exclusive use passed to the state. If this be true, the railroad company, taking possession of this wire and instrument under claim of right from the state, must use it on the terms which bound the state, or not use it at all. The ownership being in the telegraph company, the road could only have such use of it, lawfully, as it acquired from the state; and the right of the state to the use of it is governed by the terms of the agreement. It is said the contract between the state and the telegraph company is void because the superintendent and the governor had no power to make it, and because it is oppressive and extortionate. We do not decide whether this be so or not. Whenever the railroad company or the state shall cease to use the wire, shall abandon the contract and leave the instruments severely alone, and the complainants shall seek to compel compliance with the contract after that, it will be time to decide that question. But so long as this company gets the benefit of the contract by the use of the wire and the apparatus, it must also abide its terms in other respects. We are embarrassed in this view of the subject by the unskillful character of the bill. The relief it seeks is the very last one would think of, namely, to enjoin the railroad company from the use of a wire and battery and instruments running along their line, and fixtures in their offices and depots, where they may remain until it be the pleasure of the complainants to take them away. The right to compensation for what the complainant has suffered by the failure of defendants, while using the wire, to comply with the covenants of the state, can be understood; and the right of defendants to use the wire when they perform the covenants of the state can be understood; the right to a rescission of the contract, if either party prayed for it, can be understood; but this right which each claims, that he shall be let alone by the other to do as he pleases in regard to this wire is very difficult to understand. Plaintiff also says he treats as revoked the power and privilege of defendant to use the wire and instruments. Is this an abandonment of the contract by plaintiff? But there is in the bill a prayer for such other and general relief as the case may require. There is also the following stipulation after the pleadings are all in, which relieves us of much difficulty: 'It is agreed by counsel that if the use of the wire by the defendant is affected by the contract entered into between the conplainant and the state (which contract is copied in the exhibit to the bill) in such manner as that the terms of said contact must be observed and complied with by defendant in order to retain the right to such use, the case is one proper for reference to the master to take an account, unless the court should adjudge that there is no right in complainant to relief in equity.' Now, we are of opinion that the use of the wire by defendant *is* affected by the contract between complainant and the state, in such manner that if they choose to use it they must comply with its terms, as we have already said. We are also of opinion that to prevent multiplicity of suits, and to

have an accounting, instead of bringing a suit on every specific violation of the covenants of the state, complainants have a right to relief in equity."

The decree of the circuit court was therefore reversed with directions to refer the case to a master to state an account on the terms of the contract between the state and the telegraph company, as between the complainant and defendant, for the time defendant had used the wires, batteries and equipments put up under that contract, and to render a decree for that amount.

Enjoining Suits in State Courts.

HAINES *ET AL.*, TRUSTEES v. CARPENTER, EXECUTOR, *ET AL.*

Supreme Court of the United States, October Term, 1875.

The federal courts have no power to grant an injunction to restrain proceedings in state courts.

Appeal from the Circuit Court of the United States for the District of Louisiana.

Mr. Justice BRADLEY delivered the opinion of the court.

Celia A. Groves, of Madison Parish, Louisiana, by her will dated the 27th of January, 1872, amongst other things, bequeathed to the Baptist church, in the city of Vicksburg, the plantation on which she lived except one hundred and fifty acres, which were designated; and expressed a desire that the church should hold it and not sell it, and that the proceeds should be employed to educate young men for the ministry. She appointed her brother-in-law, Charles Carpenter, her universal legatee and executor, giving him siezure of the estate to carry out the provisions of the will, and the purposes of the trust. The will was admited to probate on the 16th of March, 1872, by the parish judge, and Carpenter assumed the duties of executor, and took possession of the estate.

The bill in this case was filed in September, 1872, by the appellants as trustees of the Vicksburg Baptist Church of Vicksburg in Mississippi, a body corporate of that state, alleging that said church was the one intended by the will, and charging various matters of complaint upon which relief is sought. The defendants are, first, the executor, Charles Carpenter; secondly, one Elias S. Dennis, who claims to have been a partner of testratrix; thirdly, Mary Stout, Julia Trezevant and others, who claim to be the heirs of the testatrix; fourthly, Richard H. Groves and others who claim to be the heirs of her deceased husband, George W. Groves; fifthly, John A. Klein and others, legatees named in the will. The bill states that Carpenter is unfit and incompetent to manage and control the estate; and that he lets it run to waste; and asks that he be removed and a receiver appointed. It further states, that Dennis has instituted a suit against the executor, in the Thirteenth District Court of Louisiana, claiming to have been a partner of the testatrix and that a large amount is due him as such, with a view of absorbing the succession by a judgment; and that the executor is colluding and combining with him, and asks that they be enjoined from continuing such combination. It further states that Mary Stout, Julia Trezevant and others, claiming to be the testatrix's heirs, have instituted a suit in the Parish Court of Madison Parish, alleging that the bequest to the church is void, and praying that it may be declared void, for various reasons, amongst others, as being uncertain, against the laws of Louisiana and attempting to establish a perpetuity; and that the complainants answered the petition in said suit, which is still pending. The bill further states that Richard H. Groves and others, alleging themselves to be the heirs of George W. Groves, the testatrix's husband, have also commenced a suit in said thirteenth district court, claiming that the property bequeathed belonged to him, and that the will is null and void, and praying that it may be declared void.

In view of these various proceedings, the bill claims that the case presents a multiplicity of suits, sufficient to induce a court of equity to interfere for the protection of the complainants. It also alleges that full and adequate relief can not be had unless the circuit court take cognizance of all questions presented by said suits, and of the whole subject-matter of the succession and of all suits and litigations affecting it. It also alleges that such local prejudices exist against the church that it can not obtain justice in the state courts.

The bill prays that the executor may account for all moneys received by him from the succession; and for a reference to a master to ascertain and settle all claims against the estate; and that a receiver may be appointed to take charge of the estate; that the will may be declared valid; that the complainants may be put into possession of the plantation; that the executor may be removed; and that an injunction may issue to enjoin and restrain the defendants from further prosecuting the said suit or any others suits or litigation in the promises.

This bill was dismissed by the court below on demurrer, and from that decree this appeal was taken.

A mere statement of the bill is sufficient to show that it can not be sustained. Whilst it undoubtedly presents some matters of equitable consideration, they are so mixed up with others of a different character, or which can not be entertained by the Circuit Court of the United States, and which constitute the main object and purpose of the suit, as to make the bill essentially bad on demurrer. In the first place, the great object of the suit is to enjoin and stop litigation in the state courts, and to bring all the litigated questions before the circuit court. This is one of the things which the federal courts are expressly prohibited from doing. By the act of March 2nd, 1793, it was declared that a writ of injunction shall not be granted to stay proceedings in a state court. This prohibition is repeated in section 720 of the Revised Statutes, and extends to all cases except where otherwise provided by the bankrupt law. This objection alone is sufficient ground for sustaining the demurrer to the bill. In the next place, the claim that the court ought to interfere on account of multiplicity of suits is manifestly unfounded. Only three suits are specified for this purpose in the bill, and each of these has a distinct object, founded on a distinct ground, and is instituted by a distinct class of claimants, who had a perfect right to institute the suit they did. The state courts have full and ample jurisdiction of the cases, and no sufficient reason appears for interfering with their proceedings.

The decree of the circuit court is affirmed.

Indictment—Rape.

WILLIAMS v. STATE OF TEXAS.*

Court of Appeals of Texas, June, 1876.

Hon. M. D. ECKTOR, Chief Justice.
" JOHN P. WHITE, } Judges.
" C. M. WINCKLER, }

1. Clerical Error in Indictment.—An indictment for rape charged that on, etc. " with force and arms one J. W., a male, in and upon Z. T., a female, (over the age of ten years) violently and feloniously did make an assault and her the said Z. T. then and there, violently and by force and arms against *he* will, did ravish and carnally know, etc." *Held*, that the omission of the letter was not fatal to the indictment, as the words "*against he will*" might be stricken out as surplusage and the remaining averments would leave the indictment sufficient in law.

2. Meaning of word "Ravish."—The word "*ravish*" implies force and violence in the man, and want of consent in the woman is.

3. Instructions—Force, Fraud and Threats.—The indictment charged that the offence was committed " with force and arms." *Held*, that it was error to refuse to instruct the jury that any threats or fraud on the part of the prisoner should not be considered by them.

Appeal from Lamar County.

Opinion of the court by WHITE, J.

This case presents to us the appeal of a party who was indicted for rape, tried and fourd guilty, and his punishment assessed at confinement in the penitentiary for a period of ten years. The two main questions suggested by the record, are, 1st. One which arises from a clerical error, no doubt committed by the pleader in drawing the indictment; and, 2nd. The applicability of the charge of the court to the offence as charged in the indictment.

In order to understand more fully the precise nature of these questions, we set out the charging portion of the indictment fully in these words, "viz:" "That on the first day of February, one thousand eight hundred and seventy-five, in the county of Lamar, and state of Texas, with force and arms, one James Williams, a male, in and upon Zelphia Taul, a female, (over the age of ten years), violently and feloniously did make an assault and her the said Zelphia Taul then and there, violently and by force and arms and against he will, did ravish and carnally know, etc."

Rape under our statute is defined to be the carnal knowledge of a woman without her consent, obtained by force, threats or frauds, etc. Pas. Dig. 2184.

There can be no doubt that the pleader in drawing the indictment as above set out intended to charge that the offence was committed without the consent of *her*, the woman alleged to have been injured; but it will be seen that from inadvertence a letter was omitted, which makes it read against *he* will, instead of against "her" will. Is this such an omission, such a defect or failure to state plainly the offence, as makes the indictment fatally bad?

There are certain rules of pleading firmly fixed and established in regard to indictments, which, if observed strictly, would avoid many of the numberless errors we are called upon to correct. The certainty required is such as will enable the accused to plead the judgment rendered in bar of any prosecution for the same offence. Pas. Dig. art. 2865; Alexander v. The State, 29 Tex. 446; The State v. Henson, 23 Tex. 233. Again, in an indictment it is always better to follow the very language of the statute, but substantial accuracy is sufficient. Francis v. The State, 21 Tex. 286; Janraqui v. The State, 28 Tex. 625; 2 Gall. 15; Drumwords v. The Republic, 2 Tex. 157. And again, the things necessary to the description of the crime must be stated. Burch v. The Republic, 1 Tex. 460; Alexander v. The State, 29 Tex. 495; Horan v. The State, 24 Tex. 162; 1 Whart. Amer. Crim. Law, § 364. There are, however, exceptions to the necessary observance of some of these general rules, and the case under consideration will be found to belong to the exceptional class. The words "without her consent" are made part of the definition given of rape in the statute, and it is unquestionably better that these words should always be used. But, suppose they

*For the following decision we are indebted to John Dowell, Esq., of Austin, Texas.

are omitted entirely in the description given, what is the effect upon the indictment? We are fortunately not without authority in giving our answer to this question. The leading case is Harmon v. The Commonwealth. In that case the indictment charged that the defendant *feloniously* did *ravish* and *carnally know* Catharine Coller, without charging that the offence was committed *forcibly* and *against* her will. Tighlman, C. J., delivering the opinion of the court, says, "The offence is not charged in the indictment to have been committed *forcibly and against the will of the woman.*" The expressions are that he feloniously did ravish and carnally know her. I am of opinion that this is sufficient. The word *ravish* implies force and violence in the man, and want of consent in the woman. That the indictment need not aver that the rape was committed *against the will of the woman* seems to be the opinion of authors of the highest authority, and he cites 1 Hab. 632; Hawk. 62, chap. 25, sec. 56; 3 Chitty Crim. Law, 812, and 1 East, 447. He then proceeds to say it may be finally concluded from all these authorities that the words *against her will* are not essential, and certainly the word *ravish*, as commonly understood, implies that it was *against her will.* Harmon v. The Commonwealth, 12 Serg. & Rawle, Pa. 69.

Following in the wake of this case is the well considered opinion in O'Connell v. The State. In this latter case, Emmitt, C. J., says: "And notwithstanding the statute prescribing the punishment uses the words and carnally know, by force and arms against her will," these words also are omitted. The reason these words or their equivalents were not deemed essential, was because they are all included or embraced in the word ravish, "or ravished," which is the essential word in all indictments for rape. It imports not only force and violence upon the part of the man, but resistance on the part of the woman. When therefore it is charged that A. B. feloniously ravished C. D., it is but a repetition to add that he carnally knew her forcibly and against her will. The form of the indictment at common law charged that the defendant there, in and upon one C. D. feloniously and violently did make an assault, and her the said C. D. then, violently and against her will, did ravish and carnally know. But even at common law, when the greatest particularity was required, it was long since held that an indictment omitting the assault was not defective, and that the words feloniously did ravish were sufficient, without the words carnally know and forcibly against her will. O'Connell v. The State, 12 Minn. 279. Our own supreme court in a recent case endorse fully this doctrine. Moon, J., says, "The reason given is that by the charge, 'did ravish,' force and violence in the man and want of consent in the woman are implied." Davis v. The State, 42 Tex. 226. See also Outlaw v. The State, 35 Tex. 482, and 2 Whart. Amer. Crim. Law. secs. 1141, 1154. The rule being so well established, we feel warranted in saying that the portion of the charge complained of in this case, *against he will*, might be safely stricken out as surplusage, and the remaining averments in the indictment would make it abundantly good.

As stated above, however, this is an exceptional case, for the general rule seems to be that a variance is always fatal in an indictment where in the omission of one letter the meaning is altered by the word misspelt into another of a different meaning. 1 Whart. Amer. Crim. Law, § 309. When we come to consider the other error assigned, we find much more difficulty, from the fact that we have discovered but few precedents in point, either in our own or the decisions of other courts, and found the question treated in none of our elementary works, as far as our research has extended.

The point is made in the instruction asked on the trial by defendant, and refused by the court. The instruction is in these words: "The indictment charges that the defendant committed the offence of rape on Zelphia Taul by force, and any threats or fraud will not be considered by you, etc." The court in the first subdivision of the charge given to the jury gave the statutory definition of rape as we have heretofore copied it above from Pas. Dig. art. 2189, and in the third subdivision of his charge, the language used by the judge is, "If you believe from the evidence that the accused Jim Williams was an adult male, and that he did in the manner as charged in the indictment, at any time within one year preceding the 12th day of June, 1875, the time of the presentment of the bill of indictment, commit a rape upon the person of the said Zelphia Taul, a female person, *in the manner defined* in the first section of the charge, you will find him guilty, etc."

This undoubtedly submitted to the jury whether or not the offence was committed by threats or fraud, whilst the indictment charged that it was done solely by force and violence.

Our opinion is that this was error. In arriving at the legislative intent a plain construction seems to be, that it was intended to make the offence complete if accomplished in either one of the three words mentioned, viz: 1. If the carnal knowledge was obtained by force. 2. If it was obtained by threats; and 3. If it was obtained by fraud. This conclusion or construction is made almost certain by the use of the disjunctive conjunction "or," and the succeeding articles of Pas. Dig. 2185 and 2186, and 2187 treat each one as a separate, substantive act, entirely independent of the others. In the light of the authorities above quoteed, the indictment no doubt would have been good, had it simply charged that the defendant did unlawfully and feloniously ravish, and carnally know the said Zelphia Taul, without setting out any of the means used to accomplish or obtain his purpose; and under such an allegation, he could have availed himself on the trial of proof of all or either of the three classes of rape mentioned. But it is a fundamental rule of pleading, applicable alike to civil and criminal practice, and which is invoked always with more stringency in criminal than civil cases, not only that the allegation and *probatu* must reciprocally meet and correspond, but that when the pleader sets out a special cause or ground of action, he will be held to that alone, and can not recover or convict upon other cause or causes not alleged. White v. The State, 15 Tex. 133; Pinson v. The State, 23 Tex. 579; Coney v. The State, 43 Tex. 414. The court should have given the instruction asked by defendant, in view of the facts in the case. Clark v. The State, 30 Tex. 448. For that error alone the case should be reversed. In addition to this error looking to the statements of facts as sent up in the record, this court is in doubt if there was that certainty and sufficiency in the evidence requisite to warrant the verdict of the jury.

The judgment of the court below is reversed and the cause remanded.

REVERSED AND REMANDED.

Liability of Sleeping-Car Companies for Money Lost.

BLUM v. SOUTHERN PULLMAN PALACE CAR CO.

United States Circuit Court, Western District of Tennessee.

Before Hon. H. B. BROWN, District Judge.

A sleeping car company is not responsible either as a common carrier or as an inn-keeper. It is bound, however, not only to furnish its guests a berth, but to keep a watch during the night, exclude unauthorized persons from the car and take reasonable care to prevent thefts. In case of loss occasioned by negligence in this regard, the company is liable for such articles as a passenger usually carries about his person, and such sum of money as may be reasonably necessary for his traveling expenses.

Charge of the court delivered by Judge BROWN, of the Eastern District of Michigan.

Gentlemen of the jury: This is an action to recover of the defendant the sum of $3,135, lost by the plaintiff while riding upon a sleeping-car owned and controlled by the defendant.

The plaintiff left Cairo in the state of Illinois, about five o'clock in the evening of March 28th, 1873, taking the boat down the river to Columbus, Kentucky. On the boat, he purchased a through ticket by rail from Columbus to Memphis, and, shortly after midnight, entered the sleeping-car of the defendant at Humboldt, Tennessee, in which he was assigned a lower berth in the section nearest the front end of the car. He disrobed himself of his outer garments, placed his waistcoat, in an inside pocket of which was a wallet containing the money in question, under his pillow, lay down and went to sleep. The train arrived at Memphis between three and four in the morning, but the plaintiff did not rise, except for a temporary purpose hereafter explained, until about seven o'clock. Meanwhile, the other passengers had all left the car. A conductor and porter employed by the defendant had charge of the car, to which the conductor and brakemen of the train also had access for the purpose of collecting fares and regulating its movements. Prior to entering his berth, plaintiff paid the conductor of the car $2, for his lodging, and at the same time handed him his through ticket to Memphis to be delivered to the conductor of the train. In rising to dress himself, the plaintiff found his waistcoat and money were missing. The important question of law is presented as to the measure of defendant's liability.

The first count in the declaration charges defendant with the responsibility of a common carrier, but there is no evidence to support it, and it was virtually abandoned upon the argument. The contract of carriage was with the railway company. It received the ticket of the plaintiff, offered him accommodation in its passenger car, and was ready to receive his luggage in another car adapted to that purpose. It drew the sleeping-car of the defendant, collected fares of its passengers, controlled its movements and provided for its safety. Plaintiff's contract with the railway company was entirely distinct from that with the defendant.

It is strenuously insisted by plaintiff's counsel, however, the defendant should be held to the responsibility of an inn-keeper. If the liability of an inn-keeper at common law does not extend to all losses of his guests not caused by an act of God, the public enemies or the negligence of the guest himself, as held by the older authorities, he is at least presumptively responsible for all injuries happening to the goods of his guests entrusted to his care, and can only exonerate himself by showing that he did all to ensure their safety which it was in his power to do, and that no default is attributable to his servants or guests. In regard to goods stolen from his custody, without evidence to show how, or by whom, it was done, his liability is the same as that of a carrier. It is admitted that if the defendant is held as an inn-keeper, it is liable for the loss of the money in question. The plaintiff's counsel have produced no case directly in point, nor has the defendant produced any authorities determining definitely the scope of liability in such cases, although the Supreme Court of Illinois has recently decided that the responsibility of a sleeping-car company is not that of an inn-keeper. The analogy is certainly a strong one between the hotel and sleeping-car. The passenger is invited to undress, and go to sleep in a bed provided for that purpose. To accept this invitation his vigilance must be relaxed, and his clothing and purse exposed to thieves. But the rigid responsibility of inn-keepers and carriers at common law was imposed in older and more troublous times, when goods were carried in common wagons, passengers traveled by coach, making frequent stops at houses of public entertainment, whose proprietors frequently colluded with thieves and highwaymen to plunder their guests. While the ancient rule is still enforced as against those classes of persons, the tendency of modern legislation and judicial opinion has been to limit it strictly to them. The keeper of a private boarding or lodging house, or of a restaurant or coffee house is not an inn-keeper in the view of the law, notwithstand-

ing he may furnish lodgings or food, or both, for the entertainment of his guests. It has also been held that the proprietor of a hotel, for summer resort, is not an inn-keeper. Notwithstanding an inn-keeper was responsible for the loss of the horses and carriage of his guest, the keeper of a livery stable is liable only as bailee for negligence. So also, notwithstanding seeming analogies in their positions, the liability of common carriers has not been extended to warehousemen, wharfingers, telegraph companies or ordinary bailees. In all these cases, except the last, the opportunities for plunder are no less favorable than those of carriers and inn-keepers. The liability of the inn-keeper, indeed, stands less upon reason than upon custom growing out of a state of society no longer existing.

There are good reasons for not extending such liability to the proprietor of a sleeping-car.

1. The peculiar construction of sleeping-cars is such as to render it almost impossible for the company, even with the most careful watch, to protect the occupants of berths from being plundered by the occupants of adjoining sections. All the berths open upon a common aisle, and are secured only by a curtain, behind which a hand may be slipped from an adjoining or lower berth, with scarcely a possibility of detection.

2. As a compensation for his extraordinary liability, the inn-keeper has a lien upon the goods of his guests for the price of their entertainment. I know of no instance where the proprietor of a sleeping-car has ever asserted such lien, and it is presumed that none such exists. The fact that he is paid in advance does not weaken the argument, as inn-keepers are also entitled to pre-payment.

3. The inn-keeper is obliged to receive every guest who applies for entertainment. The sleeping car receives only first-class passengers traveling upon that particular road, and it has not yet been decided that it is bound to receive those.

4. The inn-keeper is bound to furnish food as well as lodging and to receive and care for the goods of his guests, and, unless otherwise provided by statute, his liability is unrestricted in amount. The sleeping-car furnishes a bed only, and that, too, usually for a single night. It furnishes no food, and receives no luggage, in the ordinary sense of the term. The conveniences of the toilet are simply an incident to the lodging.

5. The conveniences of a public inn are an imperative necessity to the traveler, who must otherwise depend upon private hospitality for his accommodation, notoriously an uncertain reliance. The traveler by rail, however, is under no obligation to take a sleeping-car. The railway offers him an ordinary coach, and cares for his goods and effects in a van especially provided for that purpose.

6. The inn-keeper may exclude from his house every one but his own servants and guests. The sleeping-car is obliged to admit the employees of the train to collect fares and control its movements.

7. The sleeping-car can not even protect its guests, for the conductor of the train has a right to put them off for non-payment of fare, or violation of its rules and regulations.

I hold, therefore, that sleeping car companies are not subject to the responsibility of inn-keepers at common law, and that defendant can not be held liable upon that ground.

The scope of the liability of companies of this kind, so far as I know, has never been judicially determined. It is, undoubtedly, the law that where a passenger does not deliver his property to a carrier, but retains the exclusive possession and control of it himself, the carrier is not liable in case of a loss, as, for instance, when a passenger's pocket is picked, or an overcoat or satchel is taken from a seat occupied by him. Upon this theory, it is insisted by defendant that it can not be held liable for negligence, inasmuch as the clothing and effects of its guests are never formally delivered to it. I can not for a moment accede to this proposition. It is scarcely necessary to say that a person asleep can not retain manual possession or control of anything. The invitation to make use of the bed carries with it at invitation to sleep, and an implied agreement to take reasonable care of the guest's effects while he is in such a state that care, upon his own part, is impossible. There is all the delivery which the circumstances of the case admit. I think it should keep a watch during the night, see to it that no unauthorized persons intrude themselves into the car and take reasonable care to prevent thefts by the occupants. Defendant's own testimony tends to show a custom on its part to keep a man on watch all night, and to keep the rear door locked. Upon the night in question, however, both the conductor and porter were asleep at the rear end of the car for two or three hours prior to the arrival of the train at Memphis, leaving the front door unlocked and a brakeman sitting in the front end of the car. If you find the loss was occasioned by the negligence of the defendant in this particular, and that the plaintiff himself was guilty of no negligence, you will find for the plaintiff. It is proved, however, that the plaintiff arose once or twice during the night. either before or after the arrival of the train at Memphis, to get a drink of water at a washstand immediately adjoining his section, but separated from it by a board partition, leaving his waistcoat under his pillow. There is some conflict of evidence as to whether he could see his berth from where he was standing. If you find the plaintiff guilty of negligence in this regard, and that this negligence contributed to his loss, then he is not entitled to recover, notwithstanding the defendant was also guilty of negligence in the particulars above specified.

The measure of damages only remains to be considered. The plaintiff again claims the benefit of the law applicable to innkeepers, and insists upon his right to recover for the entire amount of his loss. The same reasoning would entitle him to recover a fortune if he had seen fit to carry it about his person and lay it under his pillow, and this, too, in the absence of notice to the company. The defendant, however, like a common carrier of passengers, is liable only for such property as the passenger may reasonably be supposed to carry about his person. It extends to his clothing and personal ornaments, the small articles of luggage usually carried in the hand and a reasonable sum of money for his traveling expenses. A man may lawfully carry any sum he chooses about his person, but with the modern facilities for obtaining drafts and sending money by express, it is, to say the least, imprudent to carry a large amount. As defendant received but two dollars for the use of its berth, it would be grossly unjust to mulct it in any sum the plaintiff may choose to swear he has lost, when the charges, simply, of transmitting this amount by express, might have been double or quadruple the price paid for the accommodation. The rule claimed by plaintiff would place carriers and owners of sleeping-cars completely at the mercy of unscrupulous and designing men. It was, at least, the duty of the plaintiff to notify the conductor of the amount he carried about him, though even then it is very doubtful whether he could have charged him with the responsibility.

The substance of the law, then, is this: the defendant was not only bound to furnish the plaintiff with a berth for his accommodation, but to keep watch and take reasonable care that he suffered no loss. If plaintiff's loss was occasioned by the want of such care, and his own negligence did not contribute to it, he is entitled to recover such sum as you may deem reasonably necessary for his personal expenses, considering the length of his journey and all the other circumstances of the case.

The jury returned a verdict for $100.

Liability of Counties for Injuries.

HARRISON *ET AL.* v. THE COUNTY OF ST. LOUIS.*

Supreme Court of Missouri, January Term, 1876.

Present, Hon. DAVID WAGNER, Chief Justice.
" T. A. SHERWOOD, } Judges.
" W. B. NAPTON, }
" WARWICK HOUGH, }

The rule that counties, being political sub-divisions of the state, are not liable for the laches of misconduct of their servants has no application to a neglect of those obligations incurred by counties, when special duties are imposed on them. Thus, where the county of St. Louis made a contract for laying water-pipe to the County Insane Asylum, the work being done under the supervision of the county engineer, and while a trench was being dug in the grounds of the asylum, it caved in and killed one of the workmen, it was *held* that the duty in which the county was engaged was not one imposed by general law upon all counties, but a self-imposed one; that *quoad hoc* the county was a private corporation, engaged in a private enterprise (more especially as the work was being done on its own property), and governed by the same rules as to its liability. In such case it is immaterial whether the preformance of the work is voluntarily assumed in the first instance, or is a special duty, imposed by the legislature, and assented to by the county. And municipal and *quasi* corporations are subject to the same doctrine of liability.

Error to the St. Louis Circuit Court.

Bakewell & Farrish, for plaintiff in error: The case at bar is one in which the county was acting in a private capacity, and was liable to the extent to which a private corporation would be. Lloyd v. The Mayor of N. Y., 5 N. Y. 369; Eastman v. Meredith, 36 N. H. 292; Bayley v. Mayor of N. Y., 3 Hill, 539; Mears v. Com. of Wilmington, 9 Ired. 73; Inhab. 4 Sch. Dis. Rumford v. Wood, 13 Mass. 198; Thayer v. Boston, 19 Pick. 511; Akron v. M. County, 18 Ohio, 229; Rhodes v. Cleveland, 10 Ohio, 159; Cunliffe v. Mayor of Albany, 2 Barb. 190; Larkin v. Co. of Saginaw, 11 Mich. 91; Kent Com. Vol. 2, p. 375; United States Bank v. Planters' Bank, 9 Whart. 907; Conrad v. Village of Ithica, 16 N. Y. 172; Hickok v. Plattsburg, 16 N. Y. 161. In this case, it is to be borne in mind, that the party injured was working under the immediate direction and superintendence of a county officer. Dill. Mun. Corp. § 792, and cases cited.

Thos. C. Reynolds, county attorney, for defendants in error, relied on Reardon v. St. Louis County, 36 Mo. 555, and referred to Dill. Mun. Corp. 2 Ed. 1873, p. 872.

SHERWOOD, J., delivered the opinion of the court.

The petition, in substance, alleges, that in September, 1872, the county of St. Louis entered into a written contract with Henry Luken, whereby the latter agreed to lay a water-pipe from the main pipe, at the intersection of Lafayette and Grand Avenues, along certain streets, to the grounds of the County Insane Asylum, thence through those grounds to a connection with the cistern of the asylum, in order to supply the same with water; that the work was to be done to the satisfaction of the county engineer; was to be superintended by him, and that such precautions should be taken in the progress of the work, and in shoring such trenches as might be dug, in order to prevent accidents to life and limb, as the engineer should direct; that the width of the trench for the reception of the pipe was to be two and a half feet, and to vary in depth with the grade of the street; that the sides of the trench were to be shored with plank and timber; that the county reserved to itself the superintending control over the work, and the right to discharge any workman the contractor might employ; that in December, 1872, the contractor had, in pursuance of the work, and under the direction of the engineer, dug on the grounds of the County Insane Asylum, then owned by the county, a trench thirty feet in depth, and not exceeding

*From advance sheets of the 62d Mo. Reports.

two and a half feet at the bottom; that by reason of this and of not being properly shored, the trench was dangerous, and known to be so by both the engineer and the contractor; that the minor son of plaintiff, Patrick Hannon, was in the employ of the contractor, engaged in laying the pipe along the bottom of the ditch, and, while the engineer was present superintending and directing the work, the side of the trench, without any fault or negligence on the part of Patrick Hannon, in consequence of the wrongful act, neglect and default of the engineer and of the contractor in failing to properly shore the sides thereof, caved in and suffocated the son of plaintiff, etc.

A demurrer was successfully interposed to this petition, on the ground that the "county is a political subdivision of the state of Missouri, and not a body corporate, either private or municipal, liable for the *laches* or misconduct of its servants or employees."

The case, as made by the pleadings, concedes the validity of the contract mentioned in the petition, and consequently that point is not open to discussion.

In the view we have taken of this case, it would be foreign alike to our purpose and the facts admitted by the demurrer to question the correctness of the proposition so generally concurred in elsewhere, asserted in Reardon v. St. Louis County, 36 Mo. 555, "that *quasi* corporations, created by the legislature for the purposes of public policy, are not responsible for the neglect of duties *enjoined on them*, unless the action is given by the statute." But as Mr. Justice Metcalf, in Bigelow v. Randolph, 14 Grey, 541, when speaking of the rule established in Mower v. Leicester, 9 Mass. 247, that a private action can not be maintained against a *quasi* corporation for neglect of *corporate duty*, unless the action be given by the statute, very appropriately remarks: "*This rule of law, however, is of limited application.* It is applied in the case of towns only, to the neglect or omission of a town to perform those duties which are imposed on all towns without their corporate assent, and *not* to the neglect of those obligations which a town incurs when a special duty is imposed on it with its consent express or implied, or a special authority is conferred on it at its request. In the latter case a town is subject to the same liabilities for the neglect of those special duties to which *private* corporations would be, if the same duties were imposed, or the same authority conferred on them, including their liability for the *wrongful neglect* as well as the *wrongful acts of their officers and agents.*"

Towns in New England, as mentioned in the above extract, occupy the same plane as *counties*, for, in Eastman v. Meredith, 36 N. H. 292, Perley, C. J., when referring to the former, says: "Towns are involuntary territorial and political divisions of the state, like counties, established for purposes of government and municipal regulation." A similar definition is given of *counties*. Dill. Mun. Corp. Vol. 1, § 10 *a*.

In the case at bar, the county of St. Louis was not engaged in the discharge of duties imposed alike by general law on all counties; duties whose performance, if neglected, might have been enforced by appropriate procedure for that purpose; but in the discharge of a self-imposed duty not enjoined by any law. And the test of the matter is this: That the county could not have been compelled to enter on the work for whose performance it contracted.

If the doctrine asserted in Bigelow v. Randolph, *supra*, be the correct one, and it has received the approval of Mr. Justice Dillon in his work on Corporations, Vol. 2, § 762, and if, as before stated, the county undertook the contract of its own volition, and not in the observance of a public duty imposed by general law, than there is no refuge from this result: that the county, in regard to the performance of that contract, must occupy the same attitude as if a mere private corporation, and the work thus contracted for should be deemed a private enterprise, undertaken for its own local benefit; and this is more especially the case, as the work at the time of the occurrence which resulted in this action was being done on its own property. And it certainly can make no difference, in point of principle, whether the "special duty is imposed with its consent, express or implied," or whether, as in the present case, it voluntarily assumed the performance of that which, if imposed by the legislature, and assented to by the county, would have become a special duty. For it is the element of consent which attaches civil liability, with its attendant consequences, to the act done. In other words, as certain results flow from the acceptance by the *quasi* corporation of a special duty or a special authority, it is therefore the exercise alone of that volition which fixes its liability. Consequently, it must become quite immaterial whether the thing done, from which civil liability ensues, originates in the free act of the county in the first place, or whether it is legislative permission and its subsequent acceptance by the county, which gives origin to the act whose negligent performance produces the injury complained of.

Bailey v. The Mayor etc., of the City of New York, 3 Hill, 531 was a suit brought to recover damages against the city for a injury to plaintiff's land in Westchester county, occasioned by the breaking away of a dam across Croton river, which dam, as well as the lands on which it was situated, was owned by the city.

It was alleged that the dam, which had been erected by certain water commissioners appointed by the state, for the purpose of introducing pure water into the city, was unskillfully built. The plan for the work had been, under the act of the legislature, submitted to the voters for their approval or rejection. It was approved; and the enterprise, which included the building of the dam, was then, in pursuance of the act, under the direction of the common council, prosecuted by the legislative commissioners at the expense of the city. The city was held liable; and these were the grounds on which Chief Justice Nelson, in a very able and exhaustive opinion, in which many authorities were cited and discussed, held the liability to be based: 1. That the legislative grant was for the purpose of private advantage and emolument, though the public might derive a common benefit therefrom; the corporation *quoad hoc* was to be regarded as a private company. 2. "By accepting the charter, the defendants thereby adopted the commissioners as their own agents to carry on the work. The acceptance was entirely voluntary, for the state could not inforce the grant upon the defendants against their will." 3. A municipal corporation, in its private character as the owner of land and houses, is to be regarded in the same light as an individual, and dealt with accordingly.

The case finally went to the court for the correction of errors, where the judgment was affirmed. 2 Den. 433. There was some diversity of opinion in that court, as to the ground on which the affirmance should be placed, nineteen members of that court voting therefor, against four for reversal; but only five of the number gave expression to their views in writing. The president of the senate gave an opinion for reversal. It may be very reasonably supposed, however, that those voting for affirmance did so on the same grounds as those stated in the opinion delivered. Senators Barlow and Bockie were for affirmance on the second ground stated by the chief justice, that the defendants had made the water commissioners their agents by adoption, but they did not question the correctness of the other grounds relied on by the supreme court, and in this view Senator Hand also concurred, as well as in the other views taken by the chief justice. Chancellor Walworth based his vote for affirmance on the third ground given by the chief justice, though a careful perusal of his opinion will clearly show a substantial accord between his views and those of the supreme court, except as to the question of agency resulting from adoption. The opinion in that case, having been so thoroughly discussed and considered in two courts possessing appellate jurisdiction, is valuable as a precedent, and, notwithstanding subsequent criticism (Darlington v. Mayor etc., of New York, 4 Tiff. 164,) has never been overruled. Lloyd v. Mayor etc., of New York, 5 N. Y. 369.

I am fully aware of the distinction so generally taken by the authorities between the liability of municipal corporations, on the one hand, and the non-liability of *quasi* corporations, under like circumstances, on the other, though it has been very shrewdly observed in this connection, that "the court have been much perplexed respecting the principle on which to rest the distinction." Dill. Mun. Corp. § 764. But I think it may with safety be asserted, that two admitted facts of this case disclose no sound reason why any such distinction should be tallied here, nor why the county, in respect to its own property, should not be held answerable to the same rules as would certainly prevail were a municipal or private corporation, or an individual, a party defendant. Such is evidently the drift of the above cited cases, and such must be the evident and inevitable result, if that reasoning be pushed to its natural and logical conclusion.

Again, the legislature, by the act approved February 8, 1870, recognized the County Lunatic Asylum as an existing fact, and provided that the county court might commit the insane of that county to the county institution. Laws App. to St. Louis Co. p. 202. The legislature also, by an act approved April 1, 1872, Id. 203, before the contract or work mentioned in the petition was made or entered upon, recited the fact that the asylum was built at the expense of the county, and appropriated $15,000 annually in support of "the humane objects contemplated by its establishment," thus giving the whole matter legislative sanction and recognition. So that if it be urged, that the argument is unsound which maintains, that a self-imposed duty is tantamount to a special duty imposed, or a special authority conferred by, a legislative act, the ready reply is, that the acts of the legislature referred to bring the case fully within the principle applied by Mr. Justice Metcalf, in Bigelow v. Randolph, *supra*.

This case is one of first impression in this state, and perhaps elsewhere; and if it goes beyond adjudicated cases, it certainly does not go beyond the principles which those cases enunciate.

Holding these views, the judgment should be reversed and the cause remanded. Judge Vories absent; the other judges concur.

On motion for rehearing.

There has been a motion for a rehearing filed in this cause, to which due consideration has been given. It will have been observed that, in the opinion delivered, our remarks were based on the case made by the pleadings. If, however, the facts of the case do not correspond with the admissions made by the demurrer, this is a matter of which advantage may hereafter be taken by traversing the allegations of the petition.

The motion is therefore overruled. Judge Vories absent; the other judges concur.

Personal Liability of Brokers.

GADD v. HOUGHTON.

English Court of Appeal, Exchequer Division, June, 1876.

The defendants, who were brokers, signed and sent to the plaintiff a note of a contract in the following terms:—"Mr. G. Gadd,—We have this day sold to you, on account of J. Morand & Co., 2,000 cases of Valencia oranges of the brand J. Morand & Co., Valencia, at 12s. 9d. per case, free on board. Shipment from commencement of season to not later than the 17th of December next. J. C. Houghton & Co." *Held* (reversing the decision of the Exchequer Division), that the defendants were not personally liable for the non-delivery of the goods. Paice v Walker, 18 W. R. 789, L. R. 5 Ex. 173, distinguished.

This was an appeal from an order of the Exchequer Division.

The action was brought to recover damages for the breach of a contract for the shipment of oranges from Valencia to Liverpool, and was tried at Liverpool before Pollock, B., and a special jury, on April 3, 1875.

The plaintiff, Mr. George Gadd, was a wholesale fruit merchant at Liverpool, and the defendants, Messrs. Houghton & Co., were fruit brokers, carrying on business at the same place.

On November 4, 1874, Mr. Gadd offered to Messrs. Houghton to give 12s. 9d. per case for 2,000 cases of oranges, the brand of James Morand & Co., of Valencia, part to be shipped by the first or second steamer, and the rest before December 7. The same day, the defendants sent the following telegram to Messrs. Morand:—"Offered 12s. 9d. f. o. b. 2,000 cases 420 your brand. Part shipped first or second steamer, Liverpool; remainder before 7th of December; subject your telegraphic reply Sunday."

On November 6, Messrs. Morand telegraphed to the defendants: "If your offer is 12s. 9d. f. o. b. 2,000 cases 420, we accept."

On November 7, Messrs. Morand wrote to the defendants a letter adding to the telegraphic acceptance of their offer a condition, "if weather permit gathering and shipping."

On November 9, the defendants sent the following sold-note to the plaintiff:—

"VICTORIA STREET, LIVERPOOL, November 9, 1874.

"Mr. George Gadd: We have this day sold to you on account of Messrs. Morand & Co., Valencia, 2,000 cases oranges (all 420's), of the brand James Morand & Co., at 12s. 9d. per case, free on board. Shipment from commencement of season, and not latter than 7th of December next. Payment as usual. (Signed) J. C. HOUGHTON & Co."

The oranges were not delivered in the time specified, and in consequence, the plaintiff refused to receive them, and claimed to be entitled to damages for his loss of profit on the transaction. The defendants alleged that the contract of November 9 was signed by them as brokers, and that they were not personally liable.

Some evidence was adduced on their behalf to show that, according to the custom of the trade in Liverpool, this contract was in the usual form, and that the broker would not be liable upon it.

A verdict was entered for the defendants by direction of the judge, and a rule *nisi* having been obtained on April 19, 1875, to set aside the verdict and enter it for the plaintiff, on the ground that the defendants were personally liable under the contract, the rule was argued on January 11, 1876, in the Exchequer Division of the High Court, when the court (Kelly, C. B., and Pollock and Huddleston, BB.) held, on the authority of Paice v. Walker, 18 W. R. 789, L. R. 5 Ex. 173, that the defendants, having signed the contract simply in their own name, and without describing themselves as brokers, were personally liable as principals, their lordships considering that no distinction could be taken because the supposed qualifying words in the body of the contract in this case were "on account of," while in Paice v. Walker they were "as agents for."

The defendants appealed.

Benjamin, Q. C., and *Bigham*, for the appellants. We contend that by the custom of the trade in Liverpool (as to which our evidence is undisputed), and generally on the authorities, brokers are not personally liable where the contract discloses (as it does here) the names of their principals. In the case of Cropper v. Cook, 16 W. R. 596, L. R. 3 C. P. 194, it was held that a usage in the wool trade at Liverpool was good and reasonable, in accordance with which brokers employed by both parties were in the habit, without the knowledge of the buyers, of making themselves personally liable to the sellers for the price. In that case, the contracts were at first in the same form as here, but, at the request of the sellers, the brokers altered the sold-note which they had handed to the sellers, by substituting in it for the name of the buyers the words "our principals:" and then it seems to have been assumed that the effect of that alteration was to make the brokers liable. The case is in our favor, and shows that in order to make the broker liable, the name of the principle must be left out of the contract. In a recent case of Southwell v. Bowditch, *ante*, p. 275, L. R. 1 C. P. D. 100, and on appeal, *ante*, p. 838, the court of appeal held that the broker was not personally liable, even though the name of the principal had not been disclosed. There the sold-note sent by the broker to the sellers was "Sold by your order and for your account to my principals," and it was signed by the broker without qualification. On the other hand, the decision of the Court of Exchequer in the case of Paice v. Walker appears to be against us. For there the court held that the brokers were personally liable to the buyer, merely because they had signed the contract in their own names without qualification, and although they were referred to in the body of the contract by the words "as agents for" the sellers, whose names were also mentioned. But we say that case is distinguished from the present by the use of the special words "as agents for," which were placed in a parenthesis, and which the court regarded as mere matter of description; but if that case can not be distinguished, then we say that the rule there laid down is wrong, and ought to be overruled.

Herschell, Q. C., and *McConnell*, for the respondent, said that the usage set up in Cropper v. Cook was quite different from the usage set up in this case. The question there was as to the right of the broker, as part of his employment, to make himself personally liable so as to justify him in paying the money due to the seller in full, and so to bind his principal. Apart from the question of usage of trade, it had been laid down as a general rule of law that where a person signed a contract in his own name without qualification, he was liable, even though it appeared from the body of the instrument that he was the agent of some one else: see the note to Thompson v. Davenport, 2 Smith's Leading Cases, 6th Ed. p. 344, and the remarks of Lord Campbell, C. J., in Parker v. Winslow, 7 E. & B. at p. 947: see, also, Lennard v. Robinson, 5 E. & B. 125, and Deslandes v. Gregory, 2 E. & E. 602, 8 W. R. C. L. Dig. 59. There was no substantial distinction between this case and Paice v. Walker. In both cases the principals were resident in a foreign country, and that was an additional reason why the agent should be held personally liable on the contract, if the contract would fairly bear such a construction, because of the obvious inconvenience caused by the difficulty of enforcing contracts against foreign principals. See Story on Agency, sections 400, 401, and the remark of Mr. Justice Coleridge in Lennard v. Robinson, at p. 131.

Benjamin, Q. C., was not called on to reply.

JAMES, L. J.—I am of opinion that in this case the judgment of the Court of Exchequer ought to be reversed. In the first place I would observe that it is not, according to my view of the case, in any way governed by the cause of Paice v. Walker, for, whatever may be said about the word "agent," or "as agents for," in that case, the words "on account of" in this case are not ambiguous words at all, and it would be impossible to make them words of description. The *ratio decidendi* in the case of Paice v. Walker was that the words "as agent for," having regard to the contract and circumstances of the case, might be considered as merely describing or intimating the fact that the man was an agent, and did not amount to a statement that he was making a bargain "on account of" his principals. "On account of" are the very words in this case, and where a man says he is making a contract "on account of" some one else, it seems to me that he uses the very strongest terms that the English language is capable of affording to show that he is not binding himself, but that he is binding his principals.

That that is so according to the words of this case I can not bring myself to doubt, whatever I may feel bound to say with regard to the case of Paice v. Walker. With regard to that case I can not conceive that the words "as agent" can be properly understood as implying merely a description; it seems to include the description; but those words were in a parenthesis, and though I can not think that is a very material distinction, still I am bound to say, I do not think the decision in Paice v. Walker an authority in this case. If the words in this case had been "as agents for," or if Paice v. Walker were now to be decided by me, I should hold that the words "as agents for" had the same effect as the words "on account of." But I do not think that the decision in that case amounted to more than this, that a mere description of himself "as agent" would not make a man cease to be liable upon a contract which he had entered into. I agree with that, though I can not agree that, where a man says, "as agent," that is a mere matter of description.

MELLISH, L. J.—I am of the same opinion. The question is, whether upon the true construction of this contract Houghton & Co., who sold the goods are themselves liable, or whether they have entered into a contract on behalf of James Morand & Co. That is to be decided by interpreting the language which has been used, according to the plain and natural interpretation; and I can not help thinking, with regard to what was said by Lord Campbell in the case which has been referred to (Parker v. Winlow), and to the passage from the note to Thompson v. Davenport in Smith's Leading Cases, that, *prima facie*, when a man signs a contract in his own name, he is a party contracting personally and that there must be something very strong on the face of the instrument to prevent that liability attaching to him; because, no doubt, if a person signs a contract, he is the person who is liable, unless there is something in the contract to show the contrary.

I can not understand, under the circumstances, if there are plain words in the contract, why we are not to say that he is contracting on behalf of somebody else. I am of opinion that there is no difference between writing, "We, as agents for C. D., have sold to you," and then signing it "A. B.," and writing, "We have sold to you," and signing that "A. B. for C. D., the seller." The only difference is that when the words come at the end of the contract, then you apply the signature to everything which goes throughout the contract; whereas, I think that you find in other cases, that, when the name is at the beginning of the contract, in the part which states who the parties are, and in the subsequent part of the contract you find the man who has called himself the agent treating himself as vendor or purchaser in the matter, then you can say that he intended to bind himself; but if there is nothing of that kind, and all that appears is, that he has been making a contract on behalf of somebody else, it seems to me necessarily to follow that that somebody else is the person liable.

It is therefore one of the simplest cases possible. Houghton & Co. say, "We have this day sold to you on account of J. Morand & Co." How can the words "on account of J. Morand & Co." be inserted merely as a description? It does not describe who Houghton & Co. are, the least in the world; but it says on whose account they have made the contract. It is "J. Houghton & Co. on account of J. Morand & Co." It follows, therefore, that the persons who signed were merely the brokers, and were not liable.

I also agree that the circumstances of the case of Paice v. Walker are to be distinguished from the circumstances of this case, and I think it is our duty to reverse the judgment of the Exchequer Division.

BAGGALLAY, J. A.—I am of the same opinion, and for the same reasons as have been stated by the lords justices.

QUAIN, J.—This appears to me to be a plain case. Where a principal is named, and the expression is that he who contracts contracts as agent for the principal, then it seems to me that a question may arise whether the agent is not personally liable. But where the principal is named and the expression in the body of the contract is that the agent

is contracting "on account of" that name, it does seem extraordinary that there should be any doubt whether such a contract would bind the agent or the principal. It is said, however, that, although this is substantially a contract with the principal, the agent must add the words "as agent of," or "on account of," Morand & Co. to his signature. I confess I do not see any necessity for that, if you can gather from the whole contract, or from the express terms of the contract, that he makes it for Morand & Co. It appears to me the case is certainly perfectly clear, and that it does not require any words at the end of the signature, because he could not add to the signature anything more than what has been stated in the body of the contract, and therefore that he does not render himself personally liable by not doing so.

ARCHIBALD, J.—I am of the same opinion. A man can contract in such a way as to render himself personally liable, or so as only to bind his principal. The usual way in which a person saves his liability is by signing as agent. But that is not the only thing which would prevent him from becoming liable, because if it is clear in the body of the contract that he contracted only as agent, that would save him. Now, here the contract is "sold to you on account of Morand & Co." No words could be plainer than those, as showing that he contracted only as agent. I also agree in thinking that the case of Paice v. Walker is to be distinguished from this case.

Judgment reversed and verdict directed to be entered for the defendants, with costs in the court of appeal and in the court below.

Presumption of Death from Absence.

HANCOCK, ADMR. v. AMERICAN LIFE INS. CO.*

Supreme Court of Missouri, January Term, 1876.

Present, Hon. DAVID WAGNER, Chief Justice.
" T. A. SHERWOOD, } Judges.
" WM. B. NAPTON, }

1. Absence for Seven Years—Presumption.—Where one has been absent and unheard of for seven years, the presumption arises that he is then dead, but not that he died at any particular time theretofore. To raise the latter presumption special facts and circumstances should be shown, reasonably conducting to that end The evidence need not be direct nor positive; but it should be of such a character as to make it more probable that he died at a particular time, than that he survived.

2. Presumption as to Continuance of Life.—When one is known to be alive at a certain time, there is a presumption of the continuance of his life after that period which must be overcome by some sort of proof.

3. Sudden Disappearance.—Where one studious in habits, attentive to business, with a fixed and permanent residence and pleasant domestic relations, suddenly disappears, these facts may warrant a jury in finding his death at the time.

4. Case in Judgment.—In suit brought about the year 1871, on a policy of life insurance, wherein the company put in issue the death of the assured and set up the forfeiture of his policy by failure to pay a premium note which had matured June 8th, 1861, it appeared in evidence that the assured was unmarried and without a fixed place of abode; that he disappeared about March 1st, 1861, from his boarding place at New York, with the declared intention of going to Brooklyn, and did not return; that he left behind clothes and a valise of no great value; that prior to his disappearance, he had been in the habit of writing to his friends and relatives, but was not heard of afterward; that he had lived for years in different states of the South, and had announced his intention of going thither to take up arms in her defence, and expressed, on the other hand, no design of making his residence in New York. *Held*, that under such state of facts, although the assured had been unheard of for more than seven years, the proof was insufficient to raise a presumption of the death of the assured prior to the maturity of the note, and the company could not be held.

Appeal from St. Louis Circuit Court.

Glover & Shepley with *Martin & Lackland*, for appellant.

1. There is no presumption in law that Henry C. Morris died prior to June 8, 1861, having been last seen March 1, 1861. 2 Greenl. Ev. (Redf. Ed.) § 278.

2. The burden of proving that he died before June 8, 1861, was upon the plaintiff. There is no evidence in the record of his death prior to that time. *In re* Bentham's Trust, L. R. 4 Eq. 415; Newman v. Jenkins, 10 Pick. 519; Spencer v. Roper, 13 Ired. 333; Smith v. Knowlton, 11. N. H. 197; Robinson v. Sweet, 26 Me. 378.

3. There is positive evidence of his having been seen since June 8, 1861, and of his having written a letter dated in September, 1861.

4. The court ought not to have rendered any judgment on the verdict. The petition contains no cause of action. The policy says no money is payable on it till "after satisfactory proof of death." The petition says no such proof of death was ever made.

The averment in the petition that due proof was furnished does not help the case. The proof would not do it unless it was according to the policy. State v. Marshall, 36 Mo. 491; State v. Matson, 38 Mo. 489; Hopp v. Stone, 39 Mo. 378; Mortland v. Halton, 44 Mo. 64.

Geo. P. Strong, for respondent.

1. Absence from his usual place of residence for seven years, without being heard from, is presumptive evidence that the party is dead. 1 Phil. Ev. (4th Am. Ed.) 640-41, and notes 184, 5; Id. 264, notes; Id. 599; Bliss Life Ins. (2d Ed.) 326, 327.

2. The general belief of a family, that a missing member is dead, is admissable in evidence, as in many cases it is not only the best, but the only, evidence which can be supposed of his death. Jackson v. Etz, 5 Cow. 319; Doe v. Griffin, 15 East. 393; Jackson v. Boneham, 15 Johns. 226; 1 Greenl. Ev. (2d Ed.) §§ 201, 574.

3. It was for the jury to determine, from all the circumstances of the case, at what time Henry C. Morris died. The presumption of death arising from seven years' absence does not fix the date of death at any particular point of time during the running of the seven years. Bliss Ins. (2d Ed.) 326-7; Best Pres. Ev. 45 Law Lib. 171; Mathews Presum. Ev. 291; 1 Taylor Ev. pp. 127, 128, § 125; Stonvenal v. Stephens, 2 Daly, (N. Y.) 319; Knight v. Napeau, 5 Barn. & Ad. 86; S. C., 2 M. & W., 894; Burr v. Linn, 4 Whart. 171; Smith v. Knowlton, 11 N. H. 197; Whiting v. Nicholls, 46 Ill. 241; Ang. Fire & Life Ins. 379, § 351; Tisdale v. Conn. Mut. Life Ins. Co., 26 Iowa, 171; S. C. 28 Iowa, 12; White v. Mann, 26 Me. 370.

WAGNER, C. J., delivered the opinion of the court.

Plaintiff in his petition alleged that he was administrator of Henry C. Morris, deceased, and that defendant, by its policy dated June 8, 1860, in consideration of — dollars, paid and secured to be paid by deceased, assured his life in the sum of $5,000 for the term of his natural life, and promised and agreed well and truly to pay, or cause to be paid, said sum of money, to the heirs, executors, administrators and assigns of the said Morris, within sixty days after due notice and satisfactory proof of his death; that said Morris died suddenly in New York city on or about March 1, 1861, and has never been heard of since. There was a further averment that, after due enquiry and search, the heirs and relatives of Morris had been unable to ascertain the particulars of his death, and unable to give to the company such proof and notice of his death as was mentioned and specified in the conditions or directions endorsed on the policy; that the heirs and legal representatives of the deceased Morris did, at divers times, give due notice and furnish proof of his death; and that more than seven years had elapsed since any of the family, or friends, or relatives, or acquaintances of Morris had heard from or of him.

The answer denied all the allegations of the petition, except that a policy was made, insuring the life of Morris for $5,000. It set up, as new matter, that the policy contained the following provision: "that in case said Henry C. Morris should not pay the premiums hereinbefore specified, on or before the days specified and appointed for the payment of the same, or shall fail to pay the interest on said premium note when due, then said policy shall be void." The answer then alleged that the policy was issued in consideration of the annual premium of $162.50, payable June 8, in each year, and that said premium, falling due June 8, 1861, was never paid, and the policy became void.

The reply averred that Morris died before June 8, 1861, and that before the premium of that date became due, he had departed this life.

A question was made here whether the notice of death was given in time, or, in fact, whether there was any sufficient notice given at all. But from the view that we have taken of the case, that question becomes unimportant and immaterial. The main question is, when did Henry C. Morris die? Unless his death occurred prior to June 8, 1861, there can be no recovery, as the premium due at that date was not paid, and if he was then living, its non-payment worked a forfeiture of the policy. Before considering the instructions given by the court, it will be necessary to advert briefly to the evidence.

It appears that Henry C. Morris was a single man; that for many years previous to his alleged death, he had been in the habit of spending his time in the South, engaged in mining and speculations; that he left the South and was for some time visiting his relations and friends in Quincy, Illinois, and from there went east, and during the winter of 1860-61 he boarded with a Dr. Scott, in New York city. At Albany, he became interested in a patent stove, which he designed introducing in the South, and had a pattern made and shipped there for him. The Rebellion at that time was about to commence, and he was open and outspoken in his sympathies with the southern people, and declared his purpose to go south and take up arms in its defence. His health seems to have not been very good, though the witnesses state that he was able to attend to business. About the 1st of March, 1861, he left his room at Dr. Scott's, with the intention of going to Brooklyn, and did not return. His clothes and valise were left in his room, but they were of little value. His friends and relatives testify that they never saw or heard of him any more. Dr. Scott testifies that he received a letter from him in the September following, but there was testimony going to show that he was mistaken, and it is evident that the jury must have thought so. It appears, also, that Morris was indebted to Dr. Scott, and also to a lady for borrowed money; that previously he was in the habit of writing to his friends and relatives, but after his disappearance about the first of March, they never received any letters from him.

The foregoing is the substance of the testimony. For the plaintiff, the court instructed the jury that, "If prior to the commencement of this suit Henry C. Morris had disappeared and had not been heard from by his friends and acquaintances for a term of seven years, then the law presumes that he is dead, and the jury will determine from all the evidence in the case at what time he died; and if the jury believe from the evidence that he died before June 8, 1861, and that defendant was notified of his death, and furnished with such proof thereof as the circumstances of the case would permit, and also that plaintiff has been appointed administrator of said Henry C. Morris' estate, then the plaintiff is entitled to recover in this action."

At the instance of the defendant, the court gave an instruction that "there is no evidence before the jury that the premium due June 8, 1861, has ever been paid, therefore, if Henry C. Morris was living at that date, the policy became forfeited, and the plaintiff can not recover in this case." And there was a refusal to declare that "the plaintiff

*From advance sheets of the 62 Mo. Reports.

having not produced any evidence that Henry C. Morris died prior to June 8, 1861, is not entitled to recover."

There was a verdict and judgment for plaintiff, and the defendant has prosecuted an appeal.

In relation to the presumption of death arising from mere absence, the rule at common law is well established. Where a party has been absent seven years, without having been heard of, the only presumption then arising is, that he is dead; there is none as to the time of his death, as to whether he died at the beginning or at the end of any particular period during those seven years. If it be important to any one to establish the precise time of such person's death, he must do so by evidence of some sort, to be laid before the jury for that purpose, beyond the mere lapse of seven years. Best. Pres. Ev. § 140; Knight v. Nepeau, 5 Barn. & Ad. 86; affirmed in Exch. 2 Mees. & Wel. 894; Spencer v. Roper, 13 Ind. 333; *In re* Benham's Trust, L. R. 4 Eq. 415; McCartee v. Campbell, 1 Barb. ch. 456. In Burr v. Sim, 4 Whart. 150, Mr. Justice Gibson denied the common law rule as generally laid down, and stated the true doctrine to be that, "the presumption of death, as a limitation of the presumption of life, must be taken to run exclusively from the termination of the prescribed period, so that the person must be taken to have then been dead, and not before." Whatever may be the true rule on this subject, all the authorities agree that when a party has been absent seven years since any intelligence has been received of him, he is, in contemplation of law, presumed to be dead. This length of time may be abridged and the presumption applied earlier than seven years, by showing special facts and circumstances, which reasonably conduce to that end. But evidence of some sort will, in all cases, be necessary. In White v. Mann, 26 Me. 361, the court say: "When a person leaves his usual place of residence with an intention of returning to it, and continues to be absent for seven years, without being heard of, he is presumed to be dead. The time when such presumption will arise may be greatly abridged by proof that the person has encountered such perils as might be reasonably expected to destroy life, and has been so situated that, according to the ordinary course of human events, he must have been heard of if he had survived."

In the King's Bench an action was on a policy of insurance on the life of L. Macleane, Esq., from the 30th of January, 1772, to the 30th of January, 1778. It appeared in evidence that about the 28th of November, 1777, Macleane sailed from the Cape of Good Hope, in the Swallow, sloop of war, which ship, not being afterwards heard of, was supposed to have been lost in a storm off the Western Islands. The question was, whether Macleane died before the 30th of January, 1778. In order to establish the affimative of that question, the plaintiff called witnesses to prove that the ship sailed from the Cape with Macleane; and several captains swore that they sailed the same day; that the Swallow must have been as forward in her course as they were on the 13th or 14th of January, the period of a most violent storm, in which she probably was lost; that the Swallow was much smaller than their vessels, which with difficulty weathered the storm. Lord Mansfield left it to the jury whether, under all the circumstances, they thought the evidence sufficient to convince them that Macleane died before the expiration of the time limited in the policy, adding that, if they thought it so doubtful as not to be able to form an opinion, the defendant ought to have their verdict. The jury found for the plaintiff. Patterson v. Black, 2 Park. on Ins. 919.

Whoever finds it important to establish death at any particular period must do so by some kind of evidence. The evidence need not be direct or positive; it may depend upon circumstances, but it should be of such a character as to make it more probable that the person died at a particular time than that he survived. When a person is known to be alive at a certain time, there is a presumption of the continuance of his life, and to overcome this presumption evidence must be adduced tending to show at what particular period he died.

Mere absence, unattended with other circumstances, will not be sufficient. In Eagle's case, 3 Abb. Pr. 218, it was said that, if it was attempted to apply the presumption short of seven years, special circumstances would necessarily have to be proved; as, for example, that at the last accounts the person was dangerously ill, or in a weak state of health, was exposed to great perils of disease or accident; that he embarked on board of a vessel which has not since been heard from, though the length of the usual voyage has long since elapsed. In all such cases, if the circumstances known are sufficient to authorize the conclusion, the decease may be placed at a time short of seven years. It has been held in Iowa that, under certain circumstances, a presumption of death may be indulged in a period of less than seven years, without showing that the deceased was subject to immediate or particular peril. The facts in that case, as stated in the report, are, that the party on whose life the policy was issued was a young man of exemplary habits, excellent character, of fair business prospects, respectably connected, and of the most happy domestic relations. He had the fullest confidence of his friends, and the entire affection of his wife, and was living in apparent happiness, with no cause of discontent with his condition, which would have influenced him to break the domestic and social ties with which he was so pleasantly bound to life. Visiting Chicago, September 25, 1866, upon business, he was last seen by an acquaintance on the corner of Lake and Clark streets in that city, about 3 o'clock P. M. of that day. No trace of him was afterwards discovered, though his friends made every effort to find him, and ascertain the cause of his mysterious disappearance. A large reward was offered through the newspapers for any information that would lead to his discovery, either dead or in life. The detective police were employed to search for him, without results. No tidings were ever received of him, and not the faintest trace of the cause or manner of his disappearance was ever discovered.

He gave no intimation to any one of an intention to absent himself, and the latest declaration of his intentions was to the effect that he expected to leave Chicago the day of his disappearance, to join his wife at Dubuque. He owed no debts amounting to any considerable sum, and had made payments of small ones about the day of his disappearance. His valise, containing clothing and other articles commonly carried by travellers, was found at his hotel, and his bill was unpaid. In the circuit court, the jury were instructed, that to raise a presumption of death from absence within a time less than seven years, it must be shown that the person alleged to be dead was subject to some specific peril, which might reasonably be supposed to have produced his death.

In the supreme court, this instruction was declared to be wrong, and it was held, that evidence of character, habits, domestic relations, and the like, making the abandonment of home and family improbable, and showing a want of all those motives which can be supposed to influence men to such acts, may be sufficient to raise the presumption of death, or from which the death of one absent and unheard from may be inferred, without regard to the duration of such absence. Tisdale v. Conn. Mut. Life Ins. Co., 26 Iowa, 170.

With the rule laid down in the above case, we concur. The circumstances and situation of the party, his entire surroundings, his fixed home, his expressed intention of immediately departing for it, with his almost simultaneous disappearance, and the exhaustive search that was at once made, failing entirely to clear up or reveal anything in relation to the mystery of his disappearance, wove a net of circumstances from which it might well be inferred that his absence was solely attributable to his death. It may well be conceded that where a person is studious in his habits, attentive to his business, has a fixed and permanent residence, and is surrounded by those influences which are calculated to endear him to his home, suddenly and unaccountably disappears, a presumption may arise which would warrant a jury in finding that he was dead. But will the circumstances of this case warrant the admission of any such doctrine? Morris had no family; he had no fixed or permanent place of abode. For years he had been residing in the South, being in different states, and engaged in different places. He told his relatives that he was going back to the South. He made arrangements to introduce a patent there. He was warm in his sympathies for the southern cause, and expressed his determination to take up arms in its defence. No intention was ever shown of staying in New York, or with his friends in the North. According to his declared design, he was going south, as thousands of others did in those times.

There can, therefore, be no analogy between this case and the Iowa case. The case, therefore, simply presents a sudden and unexplained absence on the part of Morris, without being accompanied with any surrounding perils, and with his often repeated declaration, that he intended to go to another part of the country where his sympathies and interests were centered. The law will now presume that he is dead, but there is no presumption that he died previous to the expiration of seven years from his disappearance, and there was no evidence of death prior to the 8th of June, 1861, to entitle the case to be submitted to the jury.

Wherefore, the judgment should be reversed and the cause remanded. Judges Napton and Sherwood concur. Judges Vories and Hough absent.

When Payment of Taxes is Compulsory and not Voluntary—Right of Tax-payer to a Hearing before Increase of Valuation Returned by him.

THE KANSAS PACIFIC RAILWAY COMPANY v. THE BOARD OF COUNTY COMMISSIONERS OF WYANDOTT COUNTY *ET AL.*

Supreme Court of Kansas.

Hon. S. A. KINGMAN, Chief Justice.
" D. M. VALENTINE, } Judges.
" D. J. BREWER, }

1. Mode of Taxation under General Law.—Under the general tax law of 1868, the value to be placed upon personal property for taxation was, in the first instance, fixed by the party returning and listing the same, while the state had the right under section 65 of that law, after notice to the party, and enquiry before the county clerk or the commissioners, to have any errors in such valuation corrected.

2. Railroad Tax Law of 1874.— The railroad tax law of 1874, established the same rule in respect to the valuation of railroad property, and the value placed on its personal property by the owner was to be accepted unless corrected by proceedings under said section 65.

3. Construction of Conflicting Statutes.—Where there is no way of reconciling conflicting clauses of a statute, and nothing to indicate which the legislature regarded as of paramount importance, force should be given to those which would make the statute in harmony with the other legislation on the same subject, and which would tend most completely to secure the rights of all persons and parties affected by such legislation.

4. Effect of Voluntary Payment.—"Where a party pays an illegal demand with a full knowledge of all the facts which render such demand illegal, without an immediate and urgent necessity therefor, or unless to release his person or property from detention, or prevent an immediate seizure of his person or property, such payment must be deemed to be voluntary, and can not be recovered back, and the fact that the party at the time of making the payment files a written protest does not make the payment involuntary." Wabaunsee County v. Walker, 8 Kansas, 431.

5. Payment under Protest.—Where all steps for determining the amount of a tax upon personal property have been taken, the tax roll is complete and in the treasurer's hands, the taxes due, and it is made the duty of the treasurer

at a specified date to issue a warrant to the sheriff to collect all unpaid taxes on personal property, and the duty of the sheriff within sixty days thereafter to levy upon and sell sufficient personal property to pay such taxes, penalty, and costs, and no discretion is given to any one to change the amount of the tax or the time or manner of its collection, a payment to the treasurer of the tax, protesting its illegality, declaring that payment is made solely to avoid the issue of process and asserting an intention to sue for the sum illegally paid, should be considered an involuntary payment, one made to prevent an immediate seizure of the tax payer's property, although such payment was made seventeen days before the time fixed for the treasurer to issue his warrant.

Appeal from "order" of the district court refusing a temporary injunction against execution of tax warrant by sheriff of Wyandott county.

BREWER, J., delivered the opinion of the court.

The first question in this case is upon the construction to be given to the railroad tax law of 1874. By the plaintiff in error it is claimed that the valuation returned by the company is to be accepted as the proper valuation, subject to correction, after notice, as provided in section 65 of the general tax law. Genl. Stat. p. 1041. On the other hand, it is claimed that the valuation is to be made by the city and township assessors. The question hinges, in the first instance, on the construction to be given to section 7, which reads as follows:

SEC. 7. The county clerk shall return to the assessor of the county or city a copy of the schedule or list of the road, track, and other real estate and of the rolling stock and other personal property pertaining to the railroad. And such railroad track and other real estate, rolling stock and other personal property shall be assessed by the city and township assessors. *Such property shall be treated in all respects in regard to assessment and equalization the same as other property belonging to individuals*, except that it shall be treated as property belonging to railroads under terms "lands," railroad track, lots and personal property. Now if the sentence which declares that the rolling stock, etc., shall be assessed by the city and township assessors controls and refers specifically to the valuation of the property, then the contention of the defendant in error must be sustained. If, on the other hand, the clause in italics controls, we must turn to the general tax law, and if under it, the valuations placed upon their personal property by individual owners are conclusive unless corrected by proper proceedings, then, in like manner, the valuation made by the company must be taken as conclusive.

The question is one of difficulty. Indeed, it seems impossible to adopt any construction which will give full force to every clause in the section. Perhaps it will throw light on the matter if we examine the general tax law and see what rule obtains in it and what are the provisions for procuring to the state a correct tax list and at the same time protecting the property owners against excessive valuations. As to real estate the law is plain. Section 31 declares that it shall be the duty of the county assessor to list and value all the real property in his county. By section 48 the county board is ordered to meet on the first Monday in July to equalize the valuation of the real estate. By section 44 notice of this meeting is to be given so that "all persons feeling themselves aggrieved can appear and have all errors in the return corrected as justice and equity may demand." Here then is what seems a fair and reasonable provision for protecting both the state and the tax payer. In the first place, the state through its officer and without consultation with the tax payer determines the value of the property and then provides a tribunal, public notice of whose meetings must be given, before which any property holder may appear and make such showing as he desires, to have any error in the valuation of his property corrected. As to personal property the law is not so plain: at least it is not stated so directly and positively as in the case of real estate. Still, an examination of the various sections will, we, think, make clear the rule as to personal property. In the first place, there is no board of equalization of personal property; no tribunal before which the injured property holder may come and have his assessment reduced. But on the other hand, we find provision made for the state to correct any errors made by the individual. Section 65 reads as follows:

SEC. 65. The county clerk or board of county commissioners, if he or they shall have reason to believe, or be informed, that any person has given to the assessor a false statement of his personal property, moneys, or credits, investments in bonds, stocks, joint stock companies, or otherwise, or that the assessor has not returned the full amount required to be listed in his ward or township, or has omitted or made an erroneous return of any personal property, monies or credits, investments in bonds, stocks, joint stock companies, or otherwise, which are by law subject to taxation, shall proceed, at any time before the final settlement with the county treasurer, to correct the returns of the assessor, and to charge such person on the duplicate with the proper amount of taxes; to enable him to do which, he is hereby authorized and empowered to issue compulsory process, and require the attendance of any person or persons whom he may suppose to have a knowledge of the value of such articles of personal property, moneys or credits investments in bonds, stocks, joint stock companies, or otherwise, and examine such persons, on oath or affirmation, in relation to such statement or return; *and it shall be the duty of the clerk, in all such cases, to notify such person, before making entry on the duplicate, that he may have an opportunity of showing that his statement or return of the assessor was correct;* and the county clerk shall, in all such cases, file in his office a statement of the facts or evidence on which he made such correction; but he shall in no case reduce the amount returned by the assessor, without the written consent of the state auditor, given on a statement of fact submitted by the county clerk.

Here it is the false statement of the individual or the omission of the assessor that is to be corrected, matters almost necessarily prejudicial to the state and beneficial to the individual; and that this is not for the benefit of the individual is made more clear by the provision that there shall be no reduction without the written consent of the state auditor given on a statement of fact submitted by the county clerk, a proceeding too cumbersome to be of any practical value to the individual. Referring to the earlier portions of the tax law, we find that the individual is required to return under oath a statement of his personal property and its value. Sec. 10 is as follows:

SEC. 10. Every person required by this act to list property shall make out and verify by his oath, and, at any time after ten days from the time of receiving notice to that effect from the assessor, shall deliver to said assessor, on demand, a statement of all personal property, *and the value thereof*, which by this act he is required to list. * * * Section 15 gives the rules for the valuation of property. In speaking of real estate it refers to the "assessor," as the party fixing the value. But as to personal property, it says in one place, "the person required to fix the value thereon" and in another, "at such prices as the person listing believes them to be worth." Sections 17, 18 and 21 define merchants and manufacturers and how the value of their property shall be ascertained for taxation, and in them it is provided that, "he, the merchant or manufacturer, shall estimate" the value, etc. Section 29, which in terms applies to most corporations, provides that certain officers thereof shall under oath return to the county clerk the various items of their property and the value thereof, and this value stands, unless the county clerk believes that false or incorrect returns have been made, when he can correct the returns as in section 65. The assessor has, apparently, nothing to do with these returns. By section 53, a blank for his statement of taxable property is required to be left with every tax payer. By section 57, wherever the tax payer fails to make return or refuses to swear to his return, the assessor may proceed to ascertain the property and its value, and may call witnesses and examine them, and from such examination determine the amount and value of his property. By section 60, if the tax payer was absent when the assessor was collecting his returns, he may thereafter go before the county clerk and make his statement under oath, and the county clerk is to correct the returns by that statement, thus making the valuation of the individual to correct the valuation of the officer. The assessor is required to make oath that he has returned the value given by the tax payer, as appears from section 63, as follows:

Section 63. The assessor, when making his returns of personal property, shall take and subscribe an oath, which shall be certified by the officer administering the same, and attached to the return which he is required to make, which shall be in the following form: "I, ———, assessor for ——— township, in the county of ———, do solemnly swear that the value of all personal property, * * * for which a statement has been made to me, by the person required by this act, for the assessment and taxation of all the property in this state, according to the true value, to list the same, is hereby returned, as set forth in such statement." And by section 64 it is made the duty of the county clerk to add to the valuation returned, when the owner refused to swear to the value, fifty per centum on the value returned. Other sections might be cited, all pointing in the same direction, but these are sufficient. They make it clear that the rule as to personal property differs from that as to real. In the former, the individual fixes the value, and that value controls unless the state, dissatisfied therewith, takes measures to correct it, and these measures, as already decided by this court, require notice to the individual. Leavenworth County v. Long, 8 Kans. 284. In this way are the rights of the individual and state both secured. The individual giving the value of course does himself no injustice and the state is given the right to enquire into that value, summon the individual before a tribunal, present testimony and have any errors corrected. It may be well before passing from this subject to notice the change made by the law of 1876, (Laws of 1876, p. 59, sec. 14; p. 71, sec. 59, and p. 77, sec. 74), by which it would seem that the owner's valuation is no longer conclusive and that the board of equalization had jurisdiction as to personal as well as real property. With this consideration of the general tax law, let us now return to the railroad tax law. And first we remark, that if there be no way of reconciling the conflicting causes, force ought to be given to those which would place this law in harmony with the general tax law and would secure the rights of both the state and the railroads, rather than to those which would make this incongruous and out of harmony with other legislation, and would expose the railroads to arbitrary and excessive assessments, without adequate means of investigation and redress. Now, sec. 7 heretofore quoted reads, that a schedule of all the property, real and personal, naming the classes as they are described in the act, shall be returned by the clerk to the assessor and that he shall assess all, and then that all proceedings respecting assessment and equalization shall be in harmony with the general tax law. Counsel for the county would harmonize these two seemingly conflicting provisions by adding to the last some expression like this: "except as heretofore provided," counsel for the company, by construing the two together to mean that the assessor shall assess railroad property as he assesses individual property, *i. e.*, placing his own judgment upon the value of the real and accepting the owner's statement as to the value of the personal. And this we are constrained to hold is the true construction. The assessor is spoken of as such even in reference to personal property, though as to that, as we have seen, he is to accept the owner's statement as to the value, and there is no greater impropriety in the use of language than to say he shall assess the real and personal property, when it is intended that he shall as to the latter property accept as conclusive the statement of the owner as to value.

A somewhat similar use of language is found in the amendment of 1869, vesting the duties of the county assessor in the township assessors. Laws 1869, p. 241. It reads: 31. It shall be the duty of the *township* assessor in each year to list and value all the real *and personal* property in his *township* not expressly exempted from taxation. 33. The assessor shall from actual view and from the best sources of information within his reach determine, as nearly as practicable, the true value of all taxable property within his *township*, according to the rules prescribed by this act for valuing property.

Unless this be the true construction, the legislature must be held to have excepted railroads from the ordinary rules of taxation, and while making as to all other property reasonable provision for protecting the rights of both the state and the individual and providing a tribunal before which the party likely to suffer injustice may produce his evidence and establish his rights, it has placed it in the power of one man, arbitrarily and without consultation, to place a value for taxation upon the personal property of railroads, from which there is no appeal and against which there is, except in cases of fraud, no remedy. It secures a tribunal of revision as to real, but not to personal, property. For while the state board may equalize the railroad assessment, it can not reduce the total assessment. Laws 1874, sec. 10. It carries out an exception not merely as to railroads but as to certain kinds of railroad property. Again, as further evidence of the intention to harmonize railroad assessments with those of other property it is provided in sec. 9 of this act: "If any person, company or corporation * * * shall neglect to return to the county clerk the statements or schedules, * * * the property so to be returned shall be listed and assessed as other property by the city and township assessors." Without pursuing the argument further, we hold that under the laws of 1874 the same rule obtains in reference to railroad as in reference to other property, and no proceedings having been had in this case under sec. 65, to correct the valuation made by the company, that will control. We pass now to the second question, the effect of a tax under protest. The facts in respect thereto appear in this extract from the petition and the exhibit thereto attached:

IX. One half of said taxes became due on the 20th day of December, 1874, and on the 14th day of December, 1874, John P. Devereux as agent for the plaintiff tendered the treasurer of the said county the sum of $1,804.01, being one half of said personal tax legally and properly payable by plaintiff, which sum said treasurer refused to receive.

X. Thereupon, to avoid the issue of legal process for collection of such excessive tax, and under protest, said John P. Devereux paid the full amount of said tax as it appears on the tax roll as then due, namely, $2.281.08, and filed the protest of the plaintiff against the illegality thereof with said treasurer, a copy whereof is hereto annexed, marked "A."

"A."

To the Treasurer of the County of Wyandotte, State of Kansas:

The Kansas Pacific Railway Company hereby notify you that the amount legally due by said company as one half tax on the personal property in your county, due December 20th, 1874, does not exceed the sum of $1,804.01, which sum you have refused to receive, and that said company pay the sum of $2,281.08 demanded by you protesting against the illegality thereof, and solely to avoid the issue of legal process for its collection, and said company further notify you that they will hold you and your county liable for the excess above the amount legally due. That you are not to disburse or part with such excess and that said company will sue you and said county for its recovery.

THE KANSAS PACIFIC RAILWAY COMPANY.
JOHN P. DEVEREUX,
Dated 14th December, 1874. *Agent duly authorized.*

Under section 4, chapter 100, laws of 1874, the county treasurer was directed to issue a warrant for all taxes on personal property due and unpaid, on the first day of January, so that if the company had not paid before that time, it would have been the duty of the county treasurer to have issued his warrant against it, which warrant would have had all the force and effect of an execution. Was the payment voluntary? In the case of Wabaunsee County v. Walker, 8 Kan. 436, which was a case involving the question of voluntary or involuntary payment, this court says: "A correct statement of the rule governing such cases as this would probably be as follows: Where a party pays an illegal demand with a full knowledge of all the facts which render such demand illegal, without an immediate and urgent necessity therefor, or unless to release his person or property from detention, or *to prevent an immediate seizure of his* person or *property*, such payment must be voluntary, and can not be recovered back. And the fact that the party at the time of making the payment filed a written protest does not make the payment involuntary."

We see no reason to doubt the correctness of the rule as thus stated. Was this a payment to prevent an immediate seizure of the property of plaintiff in error? If the warrant had actually been issued by the treasurer and in the hands of the sheriff who was demanding payment and threatening seizure, there would be no question, for, in the language of the Supreme Court of Massachusetts, in Boston & S. Glass Co. v. Boston, 4 Met. 181, the warrant "is in the nature of an execution running against the property of the party, upon which he has no day in court, no opportunity to plead and offer proof, and have a judicial decision of the question of his liability." But here no warrant had issued, none could legally issue for seventeen days, nor could the company's property be in any manner disturbed before that time, so that there was no danger of instantaneous seizure; on the other hand, there was no further enquiry to be made by any officer or tribunal; the amount of the tax was fixed beyond any opportunity for review; there was no discretion with any as to whether a warrant should or should not issue, a levy should or should not be made. The machinery for adjusting the amount of the tax had completed its work and was at rest; only the machinery for collecting was in motion, and it moved with the certainty of fate and the rapidity of time, to the finality of seizure and sale. Where the law is imperative, and, giving no discretion, commands the issue of warrant at a definite time, and a levy under that warrant within a fixed time thereafter, must an individual wait until the last moment and pay only just as the officer was seizing his property, or may he assume that the officers of the law will obey its precepts; and when all opportunity for consideration, correction and change has passed, all discretion ended, and the tax roll is in the treasurer's hands, waiting only the lapse of a few days to ripen into a warrant and seizure, may he not then pay to the treasurer, protesting against the legality and asserting his intention to contest? Does he not then pay to prevent an immediate seizure, one that is certainly and presently impending? Wherein does the state suffer wrong, or what advantage does it lose by holding that to be an involuntary payment? Is is not a case where a party can only be reached by a proceeding at law? as suggested in Mays v. Cincinnati, 16 O. St. 268, in which "he is bound to make his defence in the first instance, and he can not postpone the litigation by paying the demand in silence and afterwards suing to recover it back." In New York, the case of Bailey v. Buell, 59 Barb. 158, is in point. In that case, the assessor obtained an order from the county judge, that plaintiff should pay the amount of tax in dispute, or execution would issue against him. On being served with a copy of the order, but without any execution being issued, plaintiff paid the amount. It was held an involuntary payment, and the tax being illegal, the party could recover.

In Union Bank v. New York, 51 Barb. 159, the notorious Judge Barnard held, that payment of an illegal tax, under a notice from the receiver of taxes that unless paid, a penalty would be imposed by way of interest, and a warrant would be issued, was a voluntary payment. The commission of appeals (51 N. Y. 638) held that such a payment was not voluntary, and reversed the decision, following Bank of the Commonwealth v. The Mayor, 43 N. Y. 188. In that case Grover, J., said: "While that (the assessment) remained in force, the tax founded thereon had the force of a judgment requiring the plaintiff to pay the tax as required by the statute. The plaintiff was legally bound so to pay, and had no lawful mode of resisting such payment. In such a case, the only resistance to the requirement of the officer charged with the collection for payment, if that could have been made, would only subject the plaintiff to further expense, and would have been entirely abortive. Under such circumstances, the plaintiff had the right to pay without affecting the right to recover back the money should the tax thereafter be determined illegal by a revisal of the assessment on which it was founded. The payment was not voluntarily made, but coerced by the law which obliged the plaintiff to make it." In Massachusetts: In Boston etc. Glass Co. v. Boston, 4 Met. 181, cited in Wabaunsee Co. v. Walker, it is held that "payment of taxes to a collector, who has a tax bill and warrant in the form prescribed by law, is to be regarded as compulsory payment, and if such taxes were assessed without authority, they may be recovered back in an action for money had and received, although the party made no protest before payment." An examination of the facts in that case will show that no execution or final process for collection had been issued, but that payment was made on the tax bills, a species of formal demand for payment. This case follows Preston v. Boston, 12 Pick. 7, where it is held, "If a person pay an illegal tax *in order to prevent the issuing of a warrant* of distress with which he is threatened *and which must issue of course, unless the tax is paid*, the payment is to be deemed compulsory, and not voluntary." In Grim v. School District, 57 Pa. 434, it is said to be settled law that "a party who, when threatened with a distress, pays an illegal tax under protest and notice of suit may maintain an action to recover it back." See, also, Henry v. Horstick, 9 Watts. 414. In Allen v. Burlington, 45 Vermont, 202, the court says: "If the plaintiff was constrained to pay the tax to save his property from distress, and to avoid a penalty and costs, it was not a voluntary payment. Babcock v. Granville, 44 Vt. 326; Henry v. Chester, 15 Vt. 469. It is not necessary that the warrant should have been issued and the levy instant. If he expected, and had had a right to expect, that in due course the warrant would issue and the collection be enforced with costs, and that unless he complied with the alternative, he must submit to the other; and he paid because otherwise the other alternative would be upon him with protest that he paid because constrained, it is not such voluntary payment that he would be precluded from recovering back the taxes so paid, if they were illegally imposed." It seem to us, then, that according to a fair and reasonable interpretation of the rule, the company paid this first half of the tax under such circumstances that it should be considered as involuntary payment. It was to prevent a seizure as certainly impending as the law could make it, and one also presently impending. It may be remarked that the entire personal tax was levied and assessed as one tax. The law simply divided the time of payment, requiring one-half to be paid in December, and the other to remain until the June following, so that if more than the one-half was paid in December, there would be some show of reason in holding that it might be corrected when the last half of the same tax was to be paid.

We see no other question in the case necessary for consideration. The ruling of the district court will be reversed and the case remanded with instructions to grant a temporary restraining order upon the giving of a proper and sufficient bond.

VALENTINE, J.—I concur in what is stated in the first four numbers of the syllabus, and what is stated in the corresponding portions of the opinion. But I express no opinion with reference to the rest of the syllabus or the opinion. And I express no opinion as to what judgment should be rendered or order made in this case.

Tenure of the Homestead Exemption in Texas—Rights of the Survivor, Heirs and Creditors Therein.

The constitution of 1845 provides: "The legislature shall have power to protect, by law, from forced sale, a certain portion of the property of all heads of families. The homestead of a family not to exceed 200 acres of land (not included in a town or city), or any town or city lot or lots, in value not to exceed $2,000, shall not be subject to forced sale for any debts hereafter contracted, nor shall the owner, if a married man, be at liberty to alienate the same, unless by the consent of the wife, in such manner as the legislature may hereafter point out." The constitution of 1866, *idem*.

The constitution of 1869 is the same, excepting it increases the value to $5,000 at the time of their (the lot or lots in any town or city) destination as a homestead, and without reference to the value of any improvements thereon, they shall not be subject to forced sale for debts, except they be for the purchase-money thereof, for the taxes assessed thereon, or for labor and material expended thereon. * * *

By the constitution of 1875, "The homestead of a family shall be, and is hereby protected from forced sale, for the payment of all debts, except for the purchase-money thereof, or a part of such purchase-money, the taxes due thereon or for work and material used in constructing improvements thereon, and in this last case only when the work and material are contracted for in writing, with the consent of the wife given in the same manner as is required in making a sale and conveyance of the homestead; nor shall the owner, if a married man, sell the homestead without the consent of the wife, given in such manner as may be prescribed by law. No mortgage, trust-deed, or other lien on the homestead shall ever be valid, except for the purchase-money thereof, or improvements made thereon, as hereinbefore provided, whether such mortgage, or trust-deed, or other lien (shall have been created by the husband alone, or together with his wife; and all pretended sales of the homestead) involving any condition of defeasance shall be void. The homestead, not in a town or city, shall consist of not more than 200 acres of land, which may be in one or more parcels, with the improvements thereon; the homestead in a city, town or village shall consist of lot or lots, not to exceed in value $5,000, at the time of their destination as the homestead, without reference to the value of any improvements thereon; *provided* that the same shall be used for the purposes of a home, or as a place to exercise the calling or business of the head of the family; *provided also*, that any temporary renting of the homestead shall not change the character of the same, when no other homestead has been acquired. On the death of the husband or wife, or both, the homestead shall descend and vest in like manner as other real property of the deceased, and shall be governed by the same laws of descent and distribution, but it shall not be partitioned among the heirs of the deceased during the lifetime of the surviving husband or wife, or so long as the survivor may elect to use or occupy the same as a homestead, or so long as the guardian of the minor children of the deceased may be permitted under the order of the proper court having the jurisdiction, to use and occupy the same."

A conveyance of the separate property of the wife, or of the homestead, to be valid, must show by the certificate of a proper officer, that the wife appeared before him, and having been by him examined privily and apart from her husband, and having the conveyance explained to her, she acknowledged the same to be her act and deed, and that she had willingly signed the same and wished not to retract. Paschal's Dig. 1003.

Upon the death of husband or wife, intestate, the survivor is entitled to an estate, for life, in one-third of the lands of deceased, if deceased have father, mother, brothers or sisters, or their descendants; otherwise survivor takes the whole estate in fee simple. Paschal's Dig. 3422.

All exempt property is by order of court set apart "for the use and benefit of the widow and children;" if there be no such property, its value is paid the widow and children—half to widow, balance to children; if no child, all to widow; if no widow, all to child or children. If the estate is solvent, the exempt property is distributed as other effects. Paschal's Dig. 1305. Laws of 1848 and Aug., 1876.

Community property (property acquired by either spouse during coverture, other than by gift, devise or descent), upon the death of either husband or wife, is distributed, half to survivor, remainder to children; if no child, all to survivor. During coverture can be disposed of by husband only; upon death of either spouse, survivor can by filing inventory and bond retain control of the same as during coverture. Paschal's Dig. 4642, 4648; 12 Leg. Vol. 1 p. 144; 13 Leg. 175, re-enacted Aug., 1876.

The author of an article on the homestead exemption (Cent. L. J. Vol. 3 p. 327), citing authorities, says: "1. The fee of the homestead is in the husband, unless it be the separate estate of the wife, and may be disposed of by his sole deed. 2. The estate of the wife in the homestead, which is either community, or the separate property of the husband, is a conditional estate for life. 3. The husband may during the lifetime of the wife lawfully alienate the land occupied as a homestead, if it be either community or his separate property; and his guarantee will take the fee simple title to the land out of which the homestead estate is carved, subject to such particular estate of homestead. 4. The holder of any valid lien, judicial or conventional, upon the land occupied as a homestead, may enforce it against the reversionary interest of the husband therein, to prevent a bar by limitation, provided it is not attempted to disturb or interfere with the enjoyment of the particular estate or right of homestead."

These deductions can not be sustained by Texas authority—not even by those cited. I will first notice the latter.

Stewart v. Mackey 16 Tex. 56, was a suit on a promissory note, and to foreclose a mortgage; lower court gave judgment for amount due on note refusing foreclosure; mortgage was given by defendant and wife (at the time note was executed) on the homestead, and occupied by mortgagors at the time as such; before suit mortgagors ceased to occupy mortgaged property as a homestead, had moved on, and claimed a homestead *other* than the former mortgaged one. The court hold that the first homestead being abandoned before the statute of limitations had barred the mortgage, it could be enforced. The court say: "The husband may in conformity with law, make any disposition whatever of the homestead, being his own property, provided his acts do not interfere with the absolute right, enjoyment and use of the homestead by the husband, wife and family, or with its sale, if this be necessary to raise funds for the acquisition of another homestead, or with the right of the wife to refuse to abandon her homestead, or acquiesce in its sale or other disposition, without provision for another. There appears to be no necessity to encroach upon the husband's right of alienation, further than may be necessary to secure these objects, nor to inhibit a creditor from taking a mortgage from the husband, subject to the contingency that the homestead may not be changed, or that the wife may not assent, and that in the mean time his claim may be barred by the statute of limitations, etc. * * * We are of opinion that the mortgage took effect and had force as a lien, as soon as the property mortgaged was abandoned, and another homestead was acquired."

Primm v. Barton, 18 Tex. 206, does not touch the question. It decides, that where a man and his wife contract to convey ganancial real estate *in futuro*, and wife dies *before* the time to convey, and husband, one year after the time had elapsed, made title, it was valid and conveyed the interest of deceased wife's children; that *time* was not of the essence of the contract.

Jordan v. Godman, 19 Tex. 273, is a case in which a husband, without being joined by his wife, sold his "claim" (as a colonist), to the land on which they lived; he and family at once moved to another state, where he died; widow returned and sued for the land. "Homestead" is not mentioned in the facts or briefs; invalidity of transfer (Paschal's Dig. 840) seems to have been relied on, and evidently was the point on which the case was decided.

Cross v. Everts, 28 Tex. 523. Everts and wife had agreed to transfer their homestead to Cross for other lands. It is not shown that the agreement was in writing and executed by Mrs. Everts, as required by statute, and to remedy which fraud and abandonment are pleaded, with prayer for damages in case the land can not be recovered. The court say: "It is well settled that a compliance with the requirements of this statute (§ 1003) is indispensable to the alienation of the wife's separate estate, or of her homestead. 4 Tex. 62; 25 Tex. 148; 25 Tex. Supp. 109; 22 Tex. 628. Without such compliance, her deed, signed, attested and delivered, is as though it had never been written—is mere waste paper—is not her act and deed. 12 Ohio, 364; 8 Hum. 556. The privy examination, acknowledgment and declaration before the officer, as required by statute, is the essence and foundation of the obligation of her deed. * * * It follows that the agreement, * * * not being executed by Mrs. Everts in the mode prescribed by statute, is absolutely null and void, as regards Mrs. Everts, the wife; and that it vests no shadow of right in the appellant to her homestead tract of land." As to tenure, this is conclusive. It is not intimated that Cross held a "lien," subject to any contingency or otherwise; the converse is apparent. The court further say: "In this case there is no fraudulent misrepresentation, no concealment, no deceit, no fraudulent imposition; nothing but a refusal to comply with an absolutely void promise to convey her homestead, which appellant knew Mrs. Evarts had a legal right to retract at any time, even up to the last moment before it was consummated."

Brewer v. Wall, 23 Tex. 585. Wall and wife sold community homestead to Brewer; gave their bond for title, not privily acknowledged by wife; they remained in possession until wife died; she left issue; defendants took possession. Wall sued them on note for "balance" of purchase-money; answer did not tender restitution of land, but professed to bring amount due into court and prayed equitable adjustment between defendants and minor children of Mrs. Wall, deceased, and plaintiff. The court say: "The husband has the right, during the lifetime of the wife, to sell their community property without the consent of the wife, unless the same be the homestead of the family; in which case the husband is not at liberty during the wife's life to alienate it without her consent. This court has decided, that the husband, as survivor of the connubial partnership, has authority after the death of the wife, to carry into effect their community property, entered into by himself alone, or jointly with the wife before her death. 18 Tex. 206. * * * Undoubtedly, a bond to compel the wife to convey at a future time would be void, because it would be an undertaking to do an unlawful thing." 27 Tex. 454.

O'Docherty v. McGloin, 25 Tex. 67. McGloin died testate, leaving wife and minor children; the homestead, testator's separate property, devised to son; widow renounced provision of will as to her; probate court set aside homestead and exempt property to widow and family; the court say: "The order setting apart the homestead for the use of the widow and children * * * was certainly proper, irrespective of the disposition of the fee by the will. The statute requires the court to

set aside the homestead for the use of the widow and children, at the first term of the court after the inventory and list of claims have been returned, which may be before the solvency of the estate has been judicially ascertained. Though it may be subject to final partition and distribution, it is not assets in the hands of the administrator, but the use of it as a homestead is reserved to the family during the period of administration.

Wright v. Hays, 34 Tex. 253. This case has nothing to do with the question. "Homestead" was by the finding of the jury excluded from the case; supreme court held to be correct.

Tiemann v. Tiemann, 34 Tex. 522. This was a divorce suit; the lower court undertook to annul defendant's title to real estate, and vest in plaintiff's, in direct violation of statute. Paschal's Dig. 3452. Of course such decision has nothing to do with the question here, nor do the authorities above cited support the propositions stated, or either of them, but when *entirely* and correctly examined, are in unison with the leading decisions on this head of our law. I do not propose to examine King John's Charter, covered with the dust of six centuries, or the works of Coke, or decisions of courts other than of Texas. We must look to Texas decisions in construing Texas laws. I will, therefore, notice cases not above mentioned.

Wood v. Wheeler, 7 Tex. 13, was a case in which creditors of an insolvent's estate, were attempting to deprive the widow and children of a portion of the homestead. The court say: "No violence is offered to the spirit and intent of the constitution, by holding that they guarantee to the sole use of the widow one-half of the property (ganancial) exempt in the lifetime of the husband, and that she is entitled to hold the other half of the exempted property, for the benefit of the children of the marriage. The possession of this property to the husband was no inducement to the extension of the credit. The debts were not based on this as a fund to which the creditors could resort, and they can have no claim on the community estate, until the portion exempted and guaranteed to the citizen or head of a family is detached from the mass of the effects. The claim of the head of the family to the exempted property is superior in right to that of the creditor; and the pretensions of the latter must yield to the inviolability of the grant to the former. * * * The object of such exemption is to confer on the beneficiary a home as an asylum; a refuge, which can not be invaded, nor its tranquillity or security disturbed, and in which may be nurtured and cherished those feelings of individual independence which lie at the foundation, and are essential to the permanency of our institutions."

Shepherd v. Cassiday, 20 Tex. 24. Mrs. Cassiday, a widow, left her homestead and took up her abode in another city with her children; did not return; six months after removal Shepherd bought the homestead at sheriff's sale, under execution against Mrs. Cassiday. The court say: "We must remember the wise and beneficent purposes of the homestead exemption; that it was intended to secure the peace, repose, independence and subsistence of citizens and families; that it was placed beyond the reach of creditors—an asylum upon which they might gaze, but which they could neither enter nor disturb. * * * But let him leave for what purpose he may, or be his intentions what they may, provided they are not those of total abandonment, his right to the exemption can not be regarded as forfeited." This was an action to recover real estate, in which parties set up and proved title; yet nothing is said of "reversionary interest," "particular estate," etc. See Richey v. Hore, 41 Tex. 341.

Gouhenant v. Cockrell, 20 Tex. 96. Gouhenant was an artist. During absence his homestead was sold under execution against him. Cockrell purchased it. The court say: "The husband can not alienate the homestead without the consent of the wife. Can he deprive her of its benefits by abandoning his residence and wandering from post to pillar, or by the acquisition of casual residences for temporary purposes? This would make the guarantees of the constitution mere form, not substance. It should be remembered that creditors have no claim upon the homestead. They trust every man with the understanding that he either has or may procure a homestead, upon which they have no more right to seize than upon the person of the debtor, or the property of a third person, in satisfaction of their debt." Then surely they can not indirectly do that which they are inhibited from directly doing. 29 Tex. 134.

In Black v. Epperson, 40 Tex. 162, it is directly held that "a judgment lien, not specific, can not attach to the homestead exemption." We think it clear that the debtor had the right to sell his homestead and acquire another with the proceeds, or otherwise, without thereby subjecting it to his general debts, or any lien not made specific by valid contract. Rg. 187.

Young v. Van Benthuysen, 30 Tex. 762, was an action of ejectment. Young and wife executed deed of trust on homestead to secure note of Young. Trustee sold to H. Young died; wife, for self and children, sued Van Benthuysen, the vendee of H., in possession; pending writ, widow died and children prosecuted. Though trustee sold during life of Young and wife, he did not advertise as required. The supreme court decreed that the children were entitled to the lots (homestead) "with all the appurtenances thereunto belonging." Here, title to the homestead, after death of parents, is vested in their children, notwithstanding the parents had created a lien thereon by equitable mortgage, which had been foreclosed during life of mortgagors, but, owing to defective notice, the sale is declared void, and though the *lien* remains intact, as it can only after death of mortgagor be enforced by decree of a court—forced sale—it is virtually void. The mortgagee is supposed to have taken the mortgage subject to be defeated by the death of mortgagor prior to sale under the power. Blair v. Thorp, 33 Tex. 38; Smith v. Elliot, 39 Tex. 201; Roberson v. Paul, 16 Tex. 472; 6 Tex 102. Though a judgdment is a lien on land *sob modo*—yet if the land sold under the judgment be, at the time of sale, without fraud, the homestead, the purchaser under the judgment (unless for purchase-money) acquires no right or title to the land. Stone v. Darnell, 20 Tex. 11; McManus v. Campbell, 37 Tex. 268; Shepherd v. Cassiday; Gouhenant v. Cockrell, *supra*. This does not apply to cases like Tadlock v. Eccles, 20 Tex. 782; Lee v. Kingsbury, 13 Tex. 69; Baxter v. Dear, 26 Tex. 17: "If the party fail to plead his exemption, and suffer the mortgage to be foreclosed and the property sold—when sued in ejectment, he can not re-try the question of homestead *vel non*."

Sossman v. Powell, 21 Tex. 664. Suit by widow and heirs of Sossman, to remove cloud from their title to portion of the homestead. "The lands in question are community property; as a homestead they were exempt from debts during the life of the husband; at his death they are still exempt. They vest, exclusively, one-half in the widow and the other half in the children of the deceased. They are entitled to the whole, and not such portion as may remain after paying the charges against the community. These lands did not constitute a fund from which the debts contracted in the lifetime of the husband were expected to be paid. If a homestead with its exemptions was necessary during the life of the husband, the necessity continues and becomes more potent after his death for the protection of the wife and family. * * * If these lands had been even the separate property of the husband, they could not have been taken for the payment of his debts." Good v. Coombs, 28 Tex. 34; Magee v. Rice, 37 Tex. 483.

Green v. Crow, 17 Tex. 180. A county court, in the matter of an insolvent's estate, set aside the homestead "to the widow, (no surviving child), her heirs, administrators and assignees in fee simple, forever." An appeal was taken to the district court, the judgment being affirmed; an appeal was then taken to supreme court, with like result. The opinion was delivered by Hemphill, C. J., (of whom Judge Paschal, in 28 Texas, says: "Whose opinions, in Dallam and in twenty volumes of Texas Reports, evince that of all our jurists, he best understood the sources of our law.") "It seems very clear that the legislature, contemplating the insolvency of the estate, and that the whole would be absorbed by creditors, leaving the widow without the means of subsistence, intended to make such provision as would to some reasonable extent afford her a support, or at least relieve her from want and the pressure of necessity; and that this provision was intended to be permanent and absolute. Where the allowance is paid in money or other property, * * * it is divided, not according to the general law of distribution, but by the special law of the section; one-half is paid to the widow, and the other half divided among the children. Is there anything in the letter and spirit of the law from which it could be concluded, that at some future day the widow and children were to account for their portions thus received? To whom or for whose benefit should they account? Not for the benefit of creditors, for the allowance is made in contravention of their rights; or, rather, they have no rights in the matter; the claim of the widow and children to their allowance being superior in right to claims of creditors against the estate of the deceased, except claims for funeral expenses, and expenses of last sickness. Nor can they be made to account to the heirs of the deceased, because, as heirs under the general laws of descent, they can have no interest. The estate being solvent, the creditors have rights to the assets superior to that derived from heirship under the general law of distribution. But the creditors have no rights as against the claim of the widow and children to the allowance, consequently the heirs, whose rights are inferior, can have none. The payment and division of the allowance, as regulated by statute, is intended to be final, without remainder or ultimate liability to creditors, or others interested in the estate. * * * These positions are indisputable when considered with reference to the money or other property paid the widow as an allowance in lieu of the homestead; and there is nothing in the section to justify the supposition that a less estate is vested, where the homestead and other articles exempt from execution are assigned the widow, then where the allowance is made up out of other property, or is paid in money. In either case the interest of the beneficiaries is absolute, and being absolute in the widow on assignment, she, as owner, has the right of disposition, there being no law repugnant to, or in abrogation of, that right. These views as to the absolute and plenary ownership of the widow and children in the property assigned them as an allowance, have reference to insolvent estates." Pg. 187; James v. Thompson, 14 Tex. 463; Lockhart v. White, 18 Tex. 110.

If there is "a long line of well considered decisions" that support the "freehold tenure" idea, I have been unable to find any of them in Texas Reports. It is true, "the contract of the husband to convey the land used and occupied as a homestead, without the wife's concurrence, is not void," yet these contracts are encompassed by contingencies that render them very precarious, if not virtually void. But see Rogers v. Renshaw, 37 Tex. 625.

Under our laws, "the separate estate of the first husband (is not) divested from its regular course of descent (and) vested in a mere stranger to his blood, and his orphan children (are not) unjustly deprived of their rightful inheritance," in any case. If a decedent's estate be *solvent*, the exemption laws do not apply; if *insolvent*, then none but creditors can complain, "as they have rights to the assets superior to that derived from heirship under the general laws of distribution." Green v. Crow, 17 Tex. p. 187. It has been often ruled by our supreme court, that "creditors" can not complain, as they could not have looked to the exempt property as a source from which to receive their pay, when the credit was given. See cited cases above.

By the constitution of 1875, the homestead "descends and vests in like manner as other real property, * * * and governed by the same laws of descent and distribution," yet the fifteenth legislature re-

cently re-enacted, substantially, the probate law of 1848 with § 45, (as to distribution of exempt property) only changed as to solvent estates. This section embodies the reason of exemption.

Regarding liens, mortgages, trusts, etc., our organic law leaves nothing for construction. H.

LIVINGSTON, TEXAS, August, 1876.

Correspondence.

DIVORCE SHYSTERS.

[To the Editors of the CENTRAL LAW JOURNAL.]

Gentlemen:—I notice in current number 35 of your journal, a communication from Mr. Pence, relative to *divorce shysters*. I have long seen their advertisements for business, wherein "residence immaterial" and "no publicity," were the chief attractions, and have wondered how decrees were procured. I had been told it was by rank perjury before the Chicago courts, and was glad when the fellow Goodrich was punished by the Supreme Court of Illinois. Within a month I soon learned the whole *modus operandi*, and if not familiar to your readers, it will be interesting, if not instructive. You will see in the Chicago *Times* a card from one G. R. Sims. (Give him a gratuitous advertisement.) His case needs the attention of the Chicago Bar Association, and if proof against him is required, I will undertake to furnish it.

A certain man in this state, conceiving that he wanted a *fresh* wife, like Lot of old, perhaps, went to Sims for aid. Nothing could be easier. He had a correspondent in Utah territory and decrees were procured there. It seems they have an elastic and liberal divorce law in that territory of the saints, and that to confer jurisdiction upon their courts in such cases, the suitor has only to allege that he "desires to become a resident of ——— County, Utah," and that the parties had better live asunder. In this case in question, the man took his wife to Sims' office, and under the pretence of drawing a paper conferring upon the husband the power to sell and dispose of his *personal property*, which she had been advised was necessary, as she intended to visit friends East, Sims drew up an entry of appearance and confession, or consent to a decree of divorce between herself and husband, and the woman signed it, believing it to be a harmless document. Sims sent the petition, appearance and consent to a decree, on the 5th of August last, to his co-adjutor in Utah, and on the 10th of August, *five days thereafter*, a decree was entered in this cause! Sims received a portion of his fee in advance; the balance was to have been paid C. O. D. upon an express package containing the decree, forwarded to the husband.

Of the validity of such a decree nothing need be said. That it is useless to protect the party obtaining it against a prosecution for bigamy, or a suit for maintenance or alimony is nothing to such shysters, who thus impose upon the credulity of their victims to swindle them.

The Chicago Bar Association contains many pure, upright and able lawyers. They owe it to themselves and to the profession at large, that such men be pursued, disbarred and driven from the ranks of the profession whose robes they disgrace. They have made a good example of Goodrich; would it not be well now to try their hand at Sims?

Yours truly, E. F. WARREN.

NEBRASKA CITY.

Notes of Recent Decisions.

Joint Action — Evidence of Separate Acts — Recovery Against one of Several Defendants.—*Bishop et al. v. Long et al.* Supreme Court of Penn. 2 Weekly Notes, 671. A sued B and C jointly for an alleged diversion of water from a stream. He failed to prove an injury through the acts of B, or to connect the acts of B with those of C, but proved a diversion of the water by C. *Held*, that he could recover against C alone.

Liability of Constable and his Sureties for not Levying an Execution—Sickness no Excuse.—*Fredenstein v. McNier et al.* Supreme Court of Illinois. 8 Chicago Leg. News, 388. Opinion by Craig, J. 1. In determining the liability of a constable and his sureties for the official acts of the constable, the bond and the statute in force at the time must be regarded as the contract between the defendants and the public. 2. The sickness of a constable is no defence to an action brought on his official bond, for failing to levy an execution; that illness can not excuse the non-performance of an official act enjoined.

Foreign Corporation—Garnishee.—*Hebel v. Amazon Ins. Co.* Supreme Court of Michigan. 5 Ins. Law Journal, 599. Opinion by Graves J. 1. A garnishee can not bind the principal defendant by an independent and spontaneous submission. 2. Where the garnishee is a foreign corporation, and the service is therefore vicarious, the application of process against some one competent to receive service can not be waived by the intended garnishee as against the principal defendant. 3. This method of obtaining jurisdiction over a foreign corporation must be confined to the cases and exercised in the way percisely indicated by the statute.

Sentence — Suspension of. — *Weaver v. The People.* Supreme Court of Michigan. 3 Month. West. Jurist, 276. Opinion by Campbell, J. Where a person pleads guilty of a felony, and the judge suspends sentence until the first day of next term, and takes his own recognizance to appear, and he is not called up for sentence nor a forfeiture taken on the day set for his appearance, another judge temporarily sitting in that county can not sentence him to states prison at a subsequent term. The failure to take such proceedings during the term amounts to an abandonment of the prosecution.

Insurance—Part Payment of Mortgage—Destruction of Premises.—*Haley et al. v. Man. Fire and Marine Ins. Co.* 5 Ins. Law Journal, 615. Supreme Court of Massachusetts. The insured had agreed with C to sell and assign certain mortgages upon completion of the payments for which C had given notes, and that there should be no foreclosure proceedings until default had been made. After one payment the property was burned. *Held*, that the payment did not diminish the amount due upon the mortgages nor the insured's interest as mortgagee. Therefore the insurers are liable as if no payment had been made.

Citation Against Guardian—When Action on Bond Barred by Statute of Limitation—Judgment in Vacation.—*Bruce v. Doolittle.* Supreme Court of Illinois. 8 Chicago Leg. News, 387. Opinion by Dickey, J. 1. When an action on a guardian's bond is barred by the statute of limitations, it does not prevent the county court from citing such guardian to account. 2. When there is an error in the previous accounting of a guardian, it may be re-stated, and the guardian charged with the omitted item. 3. It is error for the county court to enter the judgment in vacation.

Partnership—Conveyance—Right of Vendee for Injuries done to Property.—*Freck v. Blakiston.* Supreme Court of Penn. 2 Weekly Notes, 669. Opinion by Woodward, J. At the dissolution of a partnership between them, A sold B all his interest in a colliery belonging to the firm, and in "all the material, property, fixtures, machinery, tools, and engines thereto belonging, and all property, real and personal, therewith connected." Subsequently, an account was stated of the cash assets of the firm. *Held*, that A was still entitled to an account of sums subsequently received by B in payment of a loan made by the firm, and of damages recovered for injuries done to the colliery before the dissolution of the partnership.

Subrogation—Rights of Surety Against Co-surety.—*Wright v. Grover & Baker Sewing Machine Co.* Supreme Court of Pennsylvania. 2 Weekly Notes, 667. Opinion by Mercer, J. Where one of two joint sureties pays his principal's debt he is entitled to be subrogated to all the rights and remedies of the creditor against his co-surety for the collection of the latter's proportion of the debt. One of two joint sureties upon a judgment note paid the note. He then caused judgment to be entered on the note in the name of the payee to his use, and an execution to be levied upon the property of his co-surety for the amount of the latter's proportion of the debt. The court below refused to strike off the judgment or to stay execution. *Held*, that in this there was no error.

Lien Against Vessel—Supplies Furnished at Home Port—Mortgage.—*Miller v. The Kate Hinchman.* United States Circuit Court, Northern District of Illinois. 8 Chicago Leg. News, 388. Opinion by Drummond, J. 1. The mortgage, in this case, is to be paid in preference to the supplies and materials furnished in the home port. 2. As the twelfth rule now stands, and is construed by the supreme court, a claim for materials, supplies, repairs or other necessaries, where a lien exists by the law of a state, though not by the maritime law, may be enforced in the admiralty in a proper case of admiralty jurisdiction; but it by no means follows that because the law of the state gives a lien, it is superior to that of a mortgage; that as between the different liens existing in this state, that of the mortgage is paramount.

Promissory Note—Lunacy of Maker—Bona Fide Holder.—*Moore v. Lancaster Bank.* Supreme Court of Penn. 2 Weekly Notes, 674. A maker of a promissory note who is found by inquisition to have been a lunatic at the date of the note is liable to a *bona fide* holder who received the note before the inquisition and without notice of the maker's lunacy. In a suit by an endorsee against the maker of a promissory note, plaintiff gave the note in evidence. Defendant offered in evidence the record of an inquisition held after the maturity of the note, and finding defendant to have been a lunatic at the date of the note. Defendant also offered evidence to show that the proceeds of the note in suit had been appropriated to the payment of another note which had been obtained from defendant by the payee thereof, without consideration, and with notice of defendant's lunacy. *Held*, that in the absence of any offer to show fraud, or notice of defendant's lunacy on the part of the plaintiff, these offers were properly overruled.

Re-insurance—Relation Between Re-insurer.—*Strong et al. v. Phœnix Ins. Co.* Supreme Court of Missouri. 5 Ins. Law Journal, 621. Opinion by Wagner, C. J. 1. Where one is bound to protect another from a liability, he is bound by the result of a litigation to which such other is a party, provided he have notice of the litigation, and opportunity to control and manage it. 2. This rule is applicable to the case of a re-insurer. If a *bona fide* judgment is rendered against the original insurer, and he has contested the matter in good faith for the protection of the re-insurer, with his acquiescence, the latter is bound to pay the costs and expenses incurred for his benefit, and is equally bound by the judgment. 3. The United States Insurance Company had issued an inland policy on cotton on the Mississippi, which was destroyed by fire. The Phœnix Insurance Company had issued a policy re-insuring the United States on all such risks taken on the Mississippi. 4. In an action brought by the assignees of the United States against the Phœnix, *Held*, that allegations in the petition setting forth that the claim on the cotton had been unsuccessfully resisted by the United States Company, and that judgment had been obtained against the company, and that the Phœnix was privy to the suit, were proper in the pleadings, and the record of the suit and judgment was admissible on the trial.

Insurance—Breach of Warranty—Practice.—*Boos v. World Mutual Ins. Co.* Court of Appeals of New York. 5 Ins. Law Journal 566. Opinion by Rapallo, J. 1. Where it is alleged on appeal that breach of warranty had been shown in the answers to questions as to whether the insured had had any of the diseases mentioned, and in the trial no questions of law had been raised specially relating to them, a general request to charge, that upon the policy and the evidence the plaintiff could not recover is not sufficient to raise such questions for the first time on appeal. 2. The insured had had pneumonia which lasted ten days, during which he was attended by the physician, and he had had sunstroke. *Held*, that it was not error to refuse to rule as a matter of law, and submit to the jury the question of fact, whether this was serious illness within the meaning of the policy. 3. An appeal from the judgment where the trial is by jury brings up questions of law only, and does not entitle to set aside the verdict as against the weight of evidence. 4. An exception to a refusal of a motion for a new trial on the judge's minutes after the verdict was rendered was not available for any purpose.

Insurance—Broker—Reviewing Judgment.—*Standard Oil Co. v. Triumph Ins. Co.* Court of Appeals of New York. 5 Ins. Law Journal, 594. Opinion by Church, C. J. 1. A broker employed to procure, modify or have canceled a policy must be regarded as the agent of the insured, and his acts are the same as if done by the insured. 2. Where a policy was canceled under the instructions of such broker, if not by mistake, it was final upon the parties. 3. Every presumption is to be indulged in favor of a judgment, and a court of review will not look into the evidence to find a fact for the purpose of reversing a judgment. A party relying upon facts not found has ample remedy. If conclusively proved, he may request a finding, and a refusal will be available. If not conclusively proved, a denial of a motion for a finding by the court below is reviewable on appeal. 4. Evidence of custom among those engaged in insurance, if competent to explain the conduct of the parties, and how they regarded a verbal arrangement for an increase of premium, and the acts necessary for its consummation, is admissible. 5. Entries upon a broker's books bearing upon the fact of a mistake in the cancellation of a policy, and upon his credibility, were admissible.

Insurance—Evidence—Principal and Agent.—*Am. Life Ins. Co. v. Schultz.* Supreme Court of Penn. 2 Weekly Notes, 665. Opinion by Paxson, J. In a suit upon a contract made by an agent on behalf of his principal, the death of the agent does not render the other party to the contract incompetent as a witness under the act of April 15, 1869. A., through the agent of an insurance company, obtained an ordinary policy of life insurance upon a parol agreement made by the agent, that if after the third payment of premium, A. should be unwilling to continue the annual payment of premiums, the company would give him a paid-up policy for the premiums paid. The agent soon after died. After the third payment of premium, A. demanded a paid-up policy, which was refused. A. then brought suit against the company upon the parol agreement of the agent, but continued to pay (under protest), the annual premiums on the original policy. On the trial, defendants offered to show what were the powers of the agent at the time of the alleged agreement, and also offered to show what would have been the rate for a policy containing such an agreement. *Held*, reversing the judgment of the court below, that the evidence embraced by these offers should have been admitted. *Held, further*, that the death of the agent did not render the plaintiff incompetent as a witness under the act of April 15, 1869. *Held, further*, that plaintiff, having continued to pay the premiums on the original policy, could only recover in this action the difference in value between that policy and a paid-up policy.

Reforming Written Instruments on the Ground of Mistake—Proof.—*Potter v. Potter, Ex.* Supreme Court Commission of Ohio. 3 Month. West. Jurist, 287. Opinion by Day, J. Clear and convincing proof is required to warrant the reformation of a written instrument on the ground of mistake, and when it clearly appears that this rule has been disregarded in reforming an instrument, and the finding of the court can be sustained only upon the supposition that it regarded the law as requiring nothing more than a preponderance of evidence to warrant a finding sustaining the alleged mistake, a reviewing court, on error, may reverse the judgment based on such finding. The following note by the editor is appended: "The above case calls to our attention a fact well known to the profession, that there is a growing negligence on the part of the profession, and the people, in the preparation of written instruments. Business men seem not willing to pay for the labor absolutely necessary in the preparation of contracts, and consequently employ such persons as will do the work for the least sum of money, when, in fact, the careful preparation of contracts, deeds, etc., is one of the most important branches of legal business. If a lawyer makes a mistake in a declaration or plea, he can by leave of the court amend, but in order to amend a written contract under the rule stated in the principal case, he must satisfy the court by clear and convincing proof that there is a mistake in the contract; and experience teaches us that this is a most difficult task; hence the necessity of using the highest degree of care in the preparation of written contracts, both as to the statement of facts and language used. The proof must not only show that there is a mistake as to one party, but it must be shown that the mistake existed alike as to both parties. Emery v. Mohler, 69 Ill. 321. A rectification of a contract can only be had in equity when both parties have executed an instrument under a common mistake, and have done what neither of them intended. A mistake on one side only may be ground for rescinding, but not for correcting, an agreement. Sutherland *et al.* v. Sutherland *et al.*, 69 Ill. 481."

Legal News and Notes.

—The distribution of prizes to the students in the Faculty of Law at Paris took place on the 1st of last month, when M. Colmet-d'Aage, the dean, delivered a long address, from which it appears that the number of new students for the current year is somewhat less than that of last year, but more than that of the year 1873-4. 202 foreigners had joined as students, including eight students from Japan, six of whom had passed their first examination with distinction. A new library is in course of erection, which, it is hoped, will be completed in the course of about a year.

—The Texas Judiciary.—There are two appellate courts in Texas, called the supreme court and the court of appeals. The latter is a new feature in the judiciary of the state. Formerly there was but one court of final resort, the supreme court, composed of five judges. This court passed upon all cases, whether civil or criminal. The new constitution, adopted April 18, 1876, created out of this court the two of which we have spoken, and which have exclusive appellate jurisdiction of civil and criminal cases respectively. The judges of the supreme court are O. M. Roberts, chief justice, and George T. Moore and R. S. Gould, associate justices, and of the court of appeals, M. D. Ecktor, chief justice, and John P. White and C. M. Winckler, associate justices.

—Judicial Pensions in England.—From the report of the paymaster-general the pensions for judicial services (Great Britain) paid during the year 1875, are: Lord St. Leonards, late lord chancellor, to January 29, 1875, £333 6s. 8d.; Lord Chelmsford, ditto, £5,000; Lord Cairns, ditto, suspended; Lord Hatherley, ditto, £5,000; Lord Selborne, ditto, £5,000; Sir William Erle, late lord chief justice of the common pleas, £3,750; Sir John Taylor Coleridge, late puisne judge, Queen's Bench, £3,500; Sir Edward V. Williams, late puisne judge, common pleas, to November 2, 1875, £2,856 6s. 5d; Sir Samuel Martin, late baron, Court of Exchequer, £3,500; Sir John B. Byles, late puisne judge, common pleas, £3,500; Sir Henry S. Keating, late puisne judge, common pleas, from February 6, 1875, £3,198, 12s. 2d.; Sir George E. Honyman, late puisne judge, common pleas, February 19 to September 16, 1875, £1,980 14s. 6d.; Lord Penzance, late judge of the court of probate, £3,500; Sir R. T. Kindersley, late vice-chancellor, £3,500; Sir John Stuart, late vice-chancellor, £3,500; Mr. John Johnes, late county court judge, £800; Mr. William Walker, ditto, £800; Mr. James H. Blair, ditto, £1,000; Mr. William Gurdon, ditto, £1,000; Mr. Allan M. Skinner, ditto, £1,000; Sir John E. E. Wilmot, ditto, £1,000; Mr. Henry Stapylton, ditto, £1,000; Mr. R. V. Williams, ditto, £1,000; Mr. J. B. Parry, ditto, £1,000; Mr. C. J. Gale, £1,000; Mr. E. J. Lloyd, Q. C., ditto, £1,000—total, £58,718 19s. 9d. The pensions for judicial services (Ireland) include Sir Joseph Napier, late lord chancellor, £3,692 6s.; Lord O'Hagan, ditto, £3,692 6s.; Mr. Mountifort Longfield, late judge of landed estates court, £1,666 13s. 4d.; Mr. Richard Keatinge, late judge court of probate, £2,333 6s. 8d.; Mr. Arthur Bushe, late master, court of Queen's Bench, £1,384 12s.

—The *City Press*, writing of Gray's Inn, says: "Though the exact date is not known when Gray's Inn became the residence of members of the profession of the law, there is evidence from which it may be reasonably inferred that it was so occupied before the year 1370. Among the orders of the society made in the time of Elizabeth is the following: 'That no laundress, nor women called victuallers, hereafter shall come into any gentlemen's chamber, under forty years of age.' During the reign of the same sovereign it was ordered, 'That the third butler should be at the carrying forth from the buttery, and also at the distribution of the alms, thrice by the week, at Gray's Inn gate, to see that due consideration be had to the poorer sort of aged and impotent persons, as in former time he used to do.' It is supposed that the early records of the society were destroyed by fire in 1604. The ancient buildings of the Inn were by no means commodious, for in the 21st of Elizabeth it was ordered that 'henceforth no fellow of this house shall make choice of his bedfellow, but only the readers; the admission of all others shall be referred to the discretion of the treasurers.' By a survey made in 1688, the inn appears then to be divided into three courts, Holborn, Conny or Coney, and Middle courts, afterwards called chapel court. The two latter courts occupied the present area of Gray's Inn square, which was ordered to be so called on June 7, 1793. The greater part of Coney court was burnt in 1687, and this circumstance admitted of improvements being effected. Holborn court, with a number of buildings mentioned in the survey, must have included Field court, so called from its being a passage into the Red Lion fields. In a diary by Narcissus Luttrell occurs the following: '10th June, 1684.—Dr. Barebone, the great builder, having sometime since bought the Red Lion fields, near Graies Inn walks, to build on, and having for that purpose employed several workmen to goe on with the same, the gentlemen of Graies Inn took notice of it, and thinking it an injury to them, went with a considerable body of 100 persons; upon which the workmen assaulted the gentlemen, and flung bricks at them, and the gentlemen at them again, so a sharp engagement ensued; but the gentlemen routed them at last, and brought away one or two of the workmen to Graies Inn. In this skirmish one or two of the gentlemen and servants of the house were hurt, and several of the workmen.' It is generally supposed that the present chapel stands on the site of the ancient religious structure mentioned in the royal license to John de Grey in the year 1314. In 1689 it was ordered 'that it be referred to the treasurer to get a bell for the chapel, to be cast, and a wheel thereto to be new made, as he finds necessary.' This appears to have been obeyed, as there is the following inscription on the bell: 'James Bartlet made me, 1689. Samuel Buck, treasurer.'"